

# Physician Liability for Acts of Physician Extenders

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# Claims involving Physician Extenders are on the rise and Academic is getting out in front of this issue by providing its insureds with resources on this important issue.

- Claims against extenders and their physician supervisors are on the rise and Academic is getting out in front of this issue by providing its insureds with useful and informative resources on this important issue for your practice
- Through Academic's Online Medico-Legal Program, Academic insured physicians and extenders have access to online educational programs provided by the ELM Risk & Safety Institute learning platform. In particular, there are two courses currently offered on this subject:
  - (1) **Physician Liability for Advanced Practitioners**-highlights the liability risks to physicians in sharing responsibility for patients with advanced practitioners and non-physician clinicians; and
  - (2) **Risk and Safety Issues for Advanced Practitioners VIII**-designed to assist the practitioner in applying medical-legal principles to events and situations one may encounter in a specialty practice.
- Academic is currently working with ELM to develop additional courses on this important subject that will be available to our insureds in the near future.
- All Academic insureds have unlimited access, free of charge, to our **Legal Hotline**. By simply calling **800-572-0179**, the insured can speak directly with an experienced medical malpractice defense attorney regarding any issue of concern in their medical practice.

# Physician Extenders (PE)

- Skilled providers such as physician assistants (PAs), nurse practitioners (NPs) and midwives can effectively allow a practice to better serve patients. However, it is important to understand that the physician is ultimately responsible for the care provided by the extender in the name of the practice.
- In New York, the supervision or collaboration of NPs and midwives must be in accordance with a written practice agreement and written practice protocols pursuant to the Education Law. This agreement must be filed with the Department of Health.
- The practice agreement must provide that any disagreement with the NP or midwife and the supervising physician must be resolved in favor of the judgment of the physician.
- New York Law also requires that the supervising or collaborating physician must review patient records “ in a timely fashion but in no event less often than every three months.”

# Typical Claims Against Extenders

- Claims against PEs fall into the following four primary areas:
  - (1) inadequate examination;
  - (2) lack of adequate physician supervision;
  - (3) delayed referral to a consultant (the supervising physician);
  - (4) failure of diagnosis.
- Across all specialties, diagnostic errors are the most prevalent medical liability claim involving PEs. Root cause analysis shows, however, that failure or delay of diagnosis is attributed to inadequate physician supervision.

# Vicarious Liability

- In legal parlance, several types of liability are relevant for the surgeon who supervises PEs. The most common form of liability stems from the surgeon's responsibility for his or her own actions; also known as direct liability.
- The concept of vicarious liability involves a situation where the physician may be found responsible for the failure of an employee (the PE), even though the physician may have acted appropriately, or did not have any direct interaction with the patient.
- Courts will often look to whether the physician employer has the right to control and direct the employee (PE) in the performance of the work, and the manner in which the work is performed.

# Negligent Supervision

- Liability for negligence directly caused by the actions of the PE can be imputed to the physician under the concept of negligent supervision.
- Often, physicians are under the impression that having never seen the patient, nor having participated in the patient's care, insulates them from potential liability for the care rendered by their PEs.
- However, such lack of involvement may actually serve as the basis for liability to be imposed on the physician for failure to properly supervise the PE. The Plaintiff will argue that it was the physician's failure to be appropriately involved in the care of the patient in conjunction with the PE that caused harm to the patient. The courts have held that this is a legally sound basis to impose liability on the physician.

# Negligent Hiring

- Negligent hiring can be viably asserted as a claim against a physician when the physician does not exercise due diligence when hiring PEs.
- Due diligence would involve performing an appropriate investigation into the qualifications and background of potential employee PEs.
- The physician would also be responsible for ongoing assessments of the performance of the PEs.

# Litigation Statistics

- Lawsuits against PEs individually are not common, but most cases filed against a PE also name the supervising physician. Settlements that do not involve the physician are rare.
- PEs in family practice and internal medicine have the highest numbers of claims and paid claims, likely due to the larger number of PEs in those fields. Orthopedics ranks fifth in prevalence of risk for indemnity payments on behalf of PEs.

# Minimizing Risk

## *How to Lower Your Risk When Working with PAs and NPs*

- Both the American Academy of Physicians' Assistants (AAPA) and the American Academy of Nurse Practitioners (AANP) urge their members to maintain independent policies in addition to whatever coverage the employing physician provides. "We know that 98% of practicing PAs have liability insurance coverage and that 97% of employers pay the cost of that coverage," said Ellen Rathfon of AAPA.
- **Verify credentials.** Call the relevant state board or professional association to verify that the applicant graduated from an accredited program and has an active license. Query the National Practitioner Data Bank. Risk managers advise performing a criminal background check and contacting all references.

# Minimizing Risk, continued

- **Have written protocols.** Most states require some form of written protocols to define the role of the midlevel. They can vary greatly. "We like them to be as specific as possible to cover the main types of cases the midlevel will see," said Robin Diamond of AAPA . "If a lawsuit occurs, it can be easily seen if the PA or NP was paying attention to the right thing."
- **Supervise appropriately.** "Supervision can mean being in the same room or a few miles away, depending on the state," said Robin Diamond. "Some may say you have to review 20% of the PA's charts every 30 days. Doctors should go above and beyond the minimum requirements."
- **Create a culture that encourages questions.** Consider weekly meetings and make sure the PE knows that questions are welcome. Since physicians can be held liable for what the midlevel does, it's imperative that doctors have a good comfort level about their work. They should take a role in their educational development and let them know that whenever they are in doubt, they should talk to the doctor and won't ever be criticized for asking too many questions.

# \$217 Million Malpractice Case Involving a PA

- The second-largest malpractice award in US history focused directly on how a medical practice credentialed and supervised a midlevel provider.
- In 2007, a jury in Tampa, Florida, awarded \$217 million, including \$100 million in punitive damages, to a man whose cerebellar stroke was misdiagnosed as sinusitis at a hospital ED in 2000. The then-44-year-old mechanic presented with headache, nausea, dizziness, confusion, and double vision. He had a history of hypertension, diabetes, and elevated cholesterol and had a family history of stroke.
- A PE ordered blood tests and CT without contrast, which were approved by the ED physician. Both were employed by a medical group that contracted with the hospital to run the ED. The first CT scan was negative for stroke, as was a second one done a few hours later with contrast. The ED physician didn't repeat the examination, history, or neurologic assessment. Instead, he relied on the extender's findings to diagnose "sinusitis/headache". The doctor prescribed a painkiller and an antibiotic and discharged the patient.
- The next morning, the mechanic awoke with a severe headache, slurred speech, nausea, confusion, and trouble walking. He returned to the ED. A new CT scan showed that he had had a stroke. The man was left paralyzed and with mental disabilities.

# Case, continued

- The lawsuit alleged that the patient presented with classic stroke symptoms that the ED doctor should have detected. The crucial part of the trial involved the PE. When lawyers deposed him, they learned that he was an unlicensed PA, having failed the state licensure test for PAs four times. He denied during depositions that he performed patient examinations.
- The ED physician testified that he'd assumed the midlevel was a licensed PA and that he didn't need to redo the history and examination. The doctor and his medical group blamed each other. The doctor said he would have redone the examination if he'd known that the expediter was unlicensed. The medical group's leader said it was the doctor's responsibility to ask the extender about his status.
- There had been no written guidelines for what the midlevel provider was authorized to do. "This group created this system that was ripe for mishap, to push more people through the ED so they could increase profits," said plaintiff's attorney David Dickey. "Instead of hiring a real PA or another ED doctor, they used the midlevel to save money."
- The jury was clearly outraged, finding that the group had tried to conceal the midlevel's involvement from the plaintiffs and placed profits over patient safety.
- Lawsuits involving midlevel providers are likely to grow as their numbers expand and their scope of practice increases owing to pressure from the doctor shortage and the Affordable Care Act. They can provide a tremendous benefit to your practice -- if you follow established protocols about supervision, say risk managers.