Medical Malpractice and The PA

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INTRODUCTION

PAs have increased liability with
- The increasing scope of practice
- Greater patient care responsibility
- More independence/Autonomy
INTRODUCTION

- You may be told that PAs are not sued, but it is not true.
- Public education is a two-edged sword.
  - As more patients, their friends, and malpractice lawyers become aware of PAs, they see a potential malpractice target if they believe they have received a poor standard of care.

A lawsuit, even if successfully defended, carries a high financial and emotional price.
PAs must comply with:

- Federal Law
- State Law
- Regulations (i.e.- State Practice Act)
- Hospital Policies and Procedures
- Standing Orders
- Standard of Care
Why Patients Sue?

- To find out “what really happened”
- Lack of information, understanding
- Blame
- Perception: patients and their families notice behavior; “What is the practitioner covering up?”
- Need coordinated response from healthcare team
  - We can’t tell a patient that someone else will talk to them unless we are absolutely sure
  - “I’m sorry that this happened” does not admit liability
    - Value of showing compassion
- We cannot promise specific results or make excuses
- We cannot theorize as to how something happened
“I don’t want to make the wrong mistake”

~Yogi Berra
The Health Care Quality Improvement Act, passed by Congress in 1986, requires that all malpractice payments (losses, paid claims) made on behalf of any clinician a state licenses, registers, or certifies must be reported to the NPDB.

- From 1991-2007, 324,285 entries were logged
- Physicians made, on average, malpractice payments twice that of PAs
- During that time the probability of making a malpractice payment was 12 times less for PAs

Source: The National Practitioner Data Bank Research as maintained by the Division of Quality Assurance, Bureau of Health Professions, Health Resources and Services Administration, US Department of Health and Human Services.
• Information from the National Practitioner Data Bank (NPDB) reveals that PAs incur a remarkably low rate of malpractice judgments.
  – Moreover, other data support the possibility that hiring a PA may reduce the risk of malpractice liability.
• These data are especially powerful when compared with studies suggesting that neither the quality of care nor the quality of chart documentation can account for the differences between sued and never-sued providers

Sources:


Table 1.

National Practitioner Databank Entries by Provider Type: 1991 – 2007

<table>
<thead>
<tr>
<th>Type of Provider</th>
<th>Total Entries</th>
<th>Malpractice Reports</th>
<th>Number of Malpractice Payments</th>
<th>Number of Adverse Actions Reported</th>
<th>Number of Involved Providers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physician</td>
<td>320,034</td>
<td></td>
<td>245,267</td>
<td>74,767</td>
<td>268,919</td>
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<tr>
<td>PA</td>
<td>1,536</td>
<td></td>
<td>1,222</td>
<td>314</td>
<td>1,509</td>
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<tr>
<td>APN</td>
<td>2,715</td>
<td></td>
<td>2,608</td>
<td>107</td>
<td>3,265</td>
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<tr>
<td>Total</td>
<td>324,285</td>
<td></td>
<td>249,097</td>
<td>75,188</td>
<td>273,693</td>
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</tbody>
</table>

Total entries: $\chi^2 = 576.67; \text{df} = 2; p < 0.0001$; effective sample size $n = 324,285$.
Malpractice Payment field: $\chi^2 = 181.36; \text{df} = 2; p < 0.0001$.
Adverse action field: $\chi^2 = 565.66; \text{df} = 2; p < 0.0001$.

Hooker, RS; Nicholson, JG; Le, TL. Does the employment of physician assistants and nurse practitioners increase liability? *Journal of Medical Licensure and Discipline*. Vol. 95. No. 2. 2009
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<table>
<thead>
<tr>
<th>Type of Provider</th>
<th>Number of Malpractice Payments</th>
<th>Average Number of Providers</th>
<th>Ratio of Payments to Providers</th>
<th>Percent Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>249,097</td>
<td>875,241</td>
<td>-</td>
<td>41.6%</td>
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<tr>
<td>PA</td>
<td>1,222</td>
<td>39,751</td>
<td>1:32.5</td>
<td>3.08%</td>
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<tr>
<td>APN*</td>
<td>2,608</td>
<td>171,562</td>
<td>1:65.8</td>
<td>1.52%</td>
</tr>
<tr>
<td>Physician</td>
<td>245,267</td>
<td>663,928</td>
<td>1:2.7</td>
<td>37%</td>
</tr>
</tbody>
</table>
Claims against PAs usually fall into four primary areas of risk:

- Lack of adequate supervision
- Untimely referral
- Failure to diagnose
- Inadequate examination
• *Each health provider is responsible for his or her own negligent acts.*

• While in most cases you are covered under your employers policy, you may still be liable for your own negligence and may still be liable for all or part of a plaintiff’s award or settlement.

__Even though you are a dependent practitioner and your supervising physician is responsible for your actions, this does not exonerate you from risk of individual liability.__
Definitions

• Error
  – Failure of a planned action to be completed as intended (i.e., error of execution) or the use of a wrong plan to achieve an aim (i.e. error of planning)

• Adverse Event (AE)
  – An injury caused by medical management rather than the underlying condition of the patient

• Preventable Adverse Event
  – An adverse event attributable to an error

Source – IOM, 2000
What is Medical Malpractice?

- Malpractice is another word for "negligence"
  - which means that a health care provider did not measure up to the standard of care expected of reputable and careful health care providers under similar circumstances.
- If the malpractice caused harm, a lawsuit or claim may be filed to recover damages for the harm that was suffered.
Negligence

To win a negligence case and recover damages from a PA, a patient must prove each of three elements:

- The PA owed the patient a duty of care
- The PA breached that duty
- The patient was harmed as a result of the PAs action or failure to act
First Element: Duty

- Plaintiff must prove that there was a physician-patient relationship.
- Physician-patient privity is essential because it establishes the legal duty to conform to a standard of conduct- take care of patients.
Second Element: Breach of Standard of Care

- Standard of care
  What a reasonable person should do under the same or similar circumstances

- Development of a recognized accepted risk or known complication is not negligence.

- There is no requirement of a perfect result.

- Cannot blame the PA or Physician solely because of a bad result, no matter how bad the result.

- Only experts can say what Standard of Care is in given situation
STANDARD OF CARE

- How is standard of care determined?

  Testimony of other PAs, known as expert witnesses, concerning what a reasonable and prudent PA would do in the defendant’s circumstances

  Whether the PA violated any laws or regulations

  Whether the PA followed any clinical practice guidelines or protocols

  Whether the PA violated any hospital or other internal policies
Third Element: Proximate Causation

Plaintiff must prove that he or she suffered injuries as a result of the defendant’s negligent act or omission and injuries would not otherwise have occurred.

Proof to reasonable degree of medical certainty = more likely than not
Fourth Element: Damages

- If duty, breach in the standard of care, and proximate cause are proven, the defendant will be liable for the resulting damages.
CONDUCT THAT MAY LEAD TO LIABILITY

- Failure to properly diagnose
- Failure to refer
- Exceeding the scope of practice
- Negligent monitoring
- Failure to question a physician’s abnormal order
- Failure to follow-up
Anatomy of a Lawsuit

• Complaint, Summons
• Answer within 30 days
• Discovery (possibly a Scheduling Order)
• Interrogatories/ Requests for Documents/Admissions
• Obtain medical records, interviews, meetings
• Obtain expert witness reviews
• Deposition of the parties, witnesses (can subpoena)
• Deposition of experts
• IME (independent medical examination)
• Motion for Summary Judgment
• ADR: Arbitration, Mediation, Negotiation
• Trial
Depositions

- May be videotaped
- Who can be present?
- Exercise control
- Objections
- Don’t guess
- Personal Questions
- Deponents must rely on the record and policies
Testifying/ giving depositions:

- Keep answers brief, factual, to the point
- Never volunteer information
- Expect attorney “tricks”
- Be relaxed, professional, assured
- Don’t argue
- Speak clearly, forcefully
- Be consistent with answers
Claim made

- If a PA is contacted about a claim, they are not to discuss it
- They refer the potential claimant to Risk Management
- Investigation begins

"Give me a scotch on the rocks and an ambulance chaser please"
The Trial

- Selection of jury – *voir dire*
- Opening statements
- Plaintiff case presented
- Defendant case and cross-exam.
- Closing arguments
- Instructions to jury
The verdict – 2 parts

1. Judgment

2. If against the defendant, the penalty

After the trial, the appeals process
HOW TO AVOID MALPRACTICE SUITS

• Know and understand state law (scope of practice)
• Know and understand hospital and institution policies
• Communication with patient
  – Discussing medical errors with patients?
• Communication with physician
HOW TO AVOID MALPRACTICE SUITS?

- Studies show that effective communication with patients is the best way to avoid a malpractice suit.
- **PA education has always focused on interviewing skills and techniques to improve communication — two skills that can enhance any practice.**

Sources:

- Frankel RM. Communicating with patients: Research shows it makes a difference. *AAPA NEWS* 1995;16(2):8.
HOW TO AVOID MALPRACTICE SUITS?
Teamwork with your Physician

1. SHARED PRIORITIES
2. FREQUENT AND EFFECTIVE COMMUNICATION
3. MUTUAL TRUST AND RESPECT
4. PHYSICIAN ACCESSIBILITY AND APPROACHABILITY
5. CONSISTENCY OF DELIVERY OF PATIENT CARE
HOW TO AVOID MALPRACTICE SUITS?

Record keeping:

• Excellent records are the best defense against a malpractice charge.

• Standard of care also applies to records. (What kind of records would a “reasonable” clinician keep?)
HOW TO AVOID MALPRACTICE SUITS?

PA’s responsibility with regard to records:

• Safety
• Accuracy
• Confidentiality
• Currency (up to date)
HOW TO AVOID MALPRACTICE SUITS

1. Be Courteous
2. Do Your Homework
3. Avoid the EHR Trap
4. Remember to Follow Up
5. Communicate Clearly and Effectively
6. Ensure Patients Fully Understand
7. Listen and Learn
8. Expand your Educational Horizons
9. Think Like a Patient
10. Be Consistent
Malpractice & the PA
You Be the judge!

Let’s Look at
Some Cases