THE PHYSICIAN ASSISTANT AND INDIVIDUAL MEDICAL MALPRACTICE INSURANCE LANDSCAPE

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**Section I: Overview of Medical Professional Liability Insurance (Medmal)**

Physicians continue to battle medical malpractice lawsuits each year. Many times a physician does not necessarily have to do anything wrong to be sued. But it only takes one lawsuit—regardless of the basis or merit of that claim—to place one’s career and financial future in danger. As a result, physicians need the proper amount of medical professional liability insurance, commonly referred to as medical malpractice, or medmal insurance, to protect their interests.

Today, however, physicians are not the only medical professionals being sued. Recent trends show that Physician Assistants (PAs) and other allied healthcare providers are at an increasing risk of being named in lawsuits alleging malpractice. With the trend of employment opportunities for PAs growing rapidly—the U.S. Department of Labor projects opportunities will grow by 39 percent by the year 2018—we can expect to see a corresponding rise in the number of medical malpractice claims involving PAs. The American Academy of Physician Assistants (AAPA) projects that in the year 2020 there will be as many as 172,000 people eligible to practice as PAs and up to 141,000 clinically practicing PAs.

Medmal insurance protects medical professionals against potential negligence claims made by patients. Even if a state doesn’t require it, most hospitals require medmal coverage in order to gain privileges. Medmal insurance covers all types of professional liability claims, but statistics from the American Association of Orthopaedic Surgeons (AAOS) indicate the most common medical malpractice claims that affect PAs are: (1) inadequate examination; (2) lack of adequate physician supervision; (3) delayed referral to a consultant (the supervising physician); and (4) failure to diagnose. Across all specialties, diagnostic errors are the most prevalent medical liability claim involving PAs.

Though some PA professionals choose to be covered under their employers’ policies (sometimes called a rider), PAs should be aware that relying on an employer’s program entirely may not provide all the coverage they need or the limits that best protect them. While PAs may be partially covered under a policy rider, they may still be liable for their own negligence and for all or part of a plaintiff’s award or settlement. In other words, even though PAs are dependent practitioners, they are not exonerated from the risk of individual liability. In the end, each health provider is responsible for his or her own acts.
TYPES OF MEDICAL MALPRACTICE COVERAGE AVAILABLE

Hospitals and other health care facilities purchase their own insurance, and hospitals that directly employ physicians typically buy a policy that covers both the hospital and its medical staff. In addition to their coverage under the hospital, physicians may also buy their own medmal insurance from a commercial company or a physician-owned mutual company, either individually or through a group practice. Like physicians, PAs also have the option to purchase individual medmal coverage with separate limits of liability through a commercial company.

There are two different forms of malpractice insurance available to healthcare providers—“occurrence” and “claims-made.” The occurrence form has been used for several decades to provide medmal insurance. It covers incidents that happen during the policy period regardless of when the claims are reported, thus providing protection for each policy period indefinitely. However, because of past upheaval and uncertainty in the malpractice insurance market, the occurrence form is becoming a rare commodity.

The claims-made form was introduced during the mid-1970s as an alternative form of coverage. Under typical claims-made policies, a medical incident must have happened and be reported to the insurance company while the policy is in force. Once the policy has been terminated, coverage no longer exists. If coverage is desired for claims reported after the policy has been terminated, then an addition to the policy called an Extended Reporting Endorsement (known as a “tail”) must be purchased.

Tail coverage can help to eliminate gaps in protection that may occur when medical professionals change policies from one insurance company to another, either to get expanded coverage or a lower price. In addition, “prior acts” coverage can be purchased to protect the insured retroactively for those events that may have already occurred, but have not yet been reported.

When a medmal policy comes up for renewal, medical professionals must decide whether to continue their current form of coverage or choose an alternative form. Now more than ever, healthcare providers must be fully informed to obtain the best available protection without coverage gaps.
Insurance Premiums for Physician Assistants

How much PAs pay for their individual malpractice premiums depends upon their responsibilities, the location of their practice and the limits of liability they choose. For insurance purposes, PA responsibilities are typically divided into three classifications:

- **Class A**: A physician assistant who assists a qualified licensed physician in the diagnostic management of patients.
- **Class B**: A physician assistant who is involved in any of the following:
  - Assisting in Surgery - Any exposure to an operating room, other than for observation, with GP/FP or general surgeon.
  - Any exposure to trauma/emergency room procedures or responsibilities thereof (less than 10 hours a week).
  - Obstetrics exposure limited to prenatal or postnatal care.
  - Assisting in anesthesiology.
- **Class C**: A physician assistant who is involved in any of the following:
  - Assisting in Surgery - Any exposure to an operating room, other than for observation, with orthopedic surgeon, OB/GYN surgeon, cardiovascular surgeon and/or neurosurgeon, thoracic surgeon and/or plastic surgeon.
  - Any exposure to trauma/emergency room procedures or responsibilities thereof (more than 10 hours a week).
  - Exposure to obstetrics, including delivery room responsibilities.
  - Exposure to cardiac catheterization lab.

Though it can be difficult to get reliable data to use to predict what settlements, judgments and defense costs might run, these classifications can be helpful. The limits of liability a PA chooses depends primarily on their practice specialty and location. For instance, if a PA spends the majority of time assisting a cardiovascular surgeon where an increased exposure and potential claim is viewed as higher risk, that PA should seriously consider choosing the higher limits of liability. On the other hand, if a PA routinely assists in the diagnostic management of patients (i.e., patient histories, physical exams, etc.), his/her exposure is lower and, therefore, that PA may wish to choose limits of $100,000/$300,000. If the PA practices in a state that has a high incidence of malpractice claims, that PA may need to choose higher limits. It is important to note, however, that the limits of liability purchased are not to exceed those of the supervising physician.
The Myths of Medical Insurance for the Physician’s Assistant

When it comes to medical malpractice, the most common mistake PAs make is to assume that only the physician is sued if something occurs during patient care. PAs are named in malpractice suits as well. According to the AAPA, as more patients and malpractice lawyers become aware of the more prominent role that PAs take on in the delivery of care, they see a potential malpractice target if they believe they’ve received a poor standard of care. Current legal theory of medical malpractice dictates that as many people as possible will be named in a suit.

According to the AAOS, the Physician Insurers Association of America conducted a national review of closed claims (1985–2004) that involved “physician extenders,” another name given to advance practice clinicians that includes PAs. The average indemnity payment was $174,871 (unadjusted to present value), which was higher than that for physicians.

As is discussed in Section II. below, PAs can choose an individual medical professional liability policy with separate limits of liability tailored to their own needs. In this case, the PA owns the policy and selects his/her individual limits of liability to meet his/her needs based on the type of practice – which is especially important if he/she has multiple employers or does consulting work on the side. The PA typically will have his/her own defense attorney provided in the event of a claim and this attorney looks after the PA’s interests alone. In the event of a filed claim, PAs who have their own medmal policy have found that there is less conflict of interest with their employer.
Section II: Why Physician Assistants Need Their Own MedMal Policy

PAs Need Their Own Personal Advocate

When a claim is made against any medical professional, it is common for multiple healthcare professionals and organizations to be named. It follows, then, that PAs are commonly named in medmal claims alongside a physician or surgeon they work with. In this case, PAs may find themselves liable for their own negligence and for all or part of a plaintiff’s award or settlement. Or they may be in a position of having to compensate their employer who has paid damages to the claimant.

It’s true that under the concept of vicarious liability, the physician is ultimately responsible for the care provided in his/her name. However, this coverage is almost always too limited to fully protect the interests of a PA. Therefore, physician assistants need their own personal advocate to protect their interests and their career. Physician Assistants need individual medmal insurance.

Some PAs falsely believe that if they are named in a malpractice lawsuit, their employer’s coverage will fully defend them. This is not always the case and there are several disadvantages to only being covered under the employer’s coverage. With employer-provided coverage, limits are often times shared with all defendants; a PA may have no coverage for off-duty incidents, or the coverage may be canceled following a job change. Even if PAs have reviewed their employer’s policy, they will need to inquire again about whether or not the limits are separate for each professional or shared among all professionals in the facility.

Additionally, coverage through an employer rarely includes coverage for defense of a license complaint. Because of this, PAs need a policy that covers disciplinary actions that go before state licensing boards, not just malpractice suits. This protection ensures that legal counsel is covered in both situations. In any case, having individual coverage protects PAs beyond the limits of their employer provided plan.

When analyzing the need for medmal insurance, there are many other questions to keep in mind. A checklist of questions that PAs can use when analyzing their exposure as well as their coverage under an employer’s policy includes:
Section II: (Cont.)

- How much medical insurance do I need?
- Will my employer’s coverage be enough?
- What form (occurrence or claims-made) is my employer’s policy? What happens to my coverage if I leave the practice? Will I have to purchase tail coverage?
- Is my employer’s coverage dependable? Who is the insurer? What are the limits? What is the company’s financial stability rating?
- Do I perform services that aren’t covered by my employer’s policy?
- Do I need coverage for all of my areas of certification, even if my practice is limited to one area? (Policies for some areas of certification may cost more than others.)
- If my employer’s policy is claims-made, who will pay the premium for the tail coverage? If the employer refuses to promise to pay the tail premium, how much will the tail cost?
- If I decide to change employers, will my former employer’s policy cover me for an incident that occurred while I was still employed?
- Are legal costs included in the limits of liability, or will they be paid in addition to policy limits?
- Am I listed by name on my employer’s policy?
- Does the policy state any conditions that I must meet in order to stay covered?
- Is the policy available in all 50 states?

Ultimately, having individual medical insurance provides peace of mind for PAs, especially those who work for multiple employers. Even though PAs are dependent practitioners and their supervising physician is responsible for their actions, this does not exonerate them from risk of individual liability. As with any insurance policy, the most important reason to have professional liability insurance is to protect a PA’s career and his or her family’s financial future. Just as one would not consider being without health or automobile insurance, one should not be without malpractice insurance.

Conflicts of Interest

A personal policy will enable PAs to hire an individual attorney, allowing them to defend their own interests and tailor the policy to suit their specific needs. Not only does an individual medical professional liability policy provide PAs with separate limits of liability, but it also enables PAs to eliminate potential conflicts of interest that may occur with their employer group policy, according to the AAPA.

There are times when a physician or medical facility will advise a PA professional against obtaining their own coverage, preferring they did not have independent legal counsel at the time of a loss. The reasons have to do with how many medical malpractice policies are structured. Many large hospitals and medical facilities have some element of self-insurance in their medical malpractice policy. In other words, they assume part of the risk in return for a lower premium. This is often structured as a large “self-insurance” deductible in the insurance program, which means the facility is responsible for paying the first layer — often $1 million or more — of a loss. Since the facility pays those losses itself, it has even more incentive to settle a claim at a lower cost regardless of a PA’s individual culpability and the impact the losses will have on their career. A large hospital or medical facility may also seek to have a PA reimburse them for all or part of a settlement.

Another common myth about medical insurance is that if PAs carry their own insurance, they are more likely to be named in a suit. This is untrue. Insurance status is privileged information and an insurance company cannot release information about a PA’s status without their written permission. Plaintiff’s attorneys do not know a PA’s insurance status when they name them as a defendant in a lawsuit. They won’t know what insurance coverage they have in place until the discovery phase of the trial. At that point, the PA has already been named in the suit and needs his or her own protection.
Portable Coverage

There are other disadvantages for PAs to have their medical professional liability insurance solely under their employer policy. An employer policy does not provide portable insurance, which allows coverage to be continued with the same level and format of coverage when the insured changes employers. Portable insurance is crucial for PAs in three ways: (1) It typically affords coverage in more than one physician office or healthcare facility; (2) It usually provides coverage in any situation, such as when a PA is giving advice on the sidelines at a sporting event; and (3) It customarily allows coverage to continue uninterrupted even when a PA leaves his/her current physician/employer.

Many PAs do not work solely with one physician. Some engage in work outside of their regular employment, such as serving as the healthcare provider at their child’s summer camp. If a PA works for more than one physician’s office, or in other locations outside the office, they need to be cognizant that they have multiple exposures. A policy provided by one employer does not cover them at all times, leaving them with potentially substantial gaps in protection. And, if they get sued for actions that occur outside the workplace, that action may not be covered.

Another question to consider is whether PAs have “all-time protection,” which means they are covered for claims that arise after they’ve left their current physician/employer for an incident that occurred while they were there. Depending on the policy type and structure, they may not be covered. Choosing a personal policy tailored to a specific work situation ensures that PAs are always protected, giving them freedom to follow their own career opportunities. In addition, as medical facilities consolidate and close, their insurance programs change or disappear. Would a PA still be covered five to seven years (the typical life of a claim) after a facility closes?

Risk Management Resources

Providing quality care and avoiding malpractice claims are top priorities for PAs. Having their own med mal insurance also can empower PAs by providing direct access to risk management resources that can help to prevent lawsuits in the first place. A truly involved insurance provider works in partnership with PAs to help them achieve effectiveness, efficiency and reliability in their practices. Some insurers are beginning to dictate to their insureds what they can and cannot do in their practice as part of their risk management protocol. Others offer comprehensive risk management programs and supply tools that PAs can use to better themselves and their practice.

The best risk management tools and resources can help advanced practice clinicians stay educated about best practices, and prevent and address claims of malpractice – any time, anywhere. Risk management tools may include: safety manuals, practice checklists, regular risk management alerts on new regulations affecting healthcare practices, consultations with risk management experts, patient and test tracking software and more.

One of the most effective risk management tools is the ability to successfully manage the medical record. A well-kept medical record can provide the best defense in a lawsuit. On the other hand, an incomplete, inconsistent or illegible medical record may give the impression that poor or sloppy patient care was provided. (For more information, see the sidebar “Managing the Medical Record”). With some brief training in how to keep medical records legible, complete and current, a PA can demonstrate a high quality of patient care.

Another example of a risk management tool is one that helps PAs understand the laws in the state in which they practice. For example, some insurers may provide a checklist that helps PAs ensure that they are in compliance with their state’s supervision mandates and scope of practice for their profession. It is recommended that this, or a similar document, be reviewed by both PAs and their supervising physician on a regular basis, as agreed upon, and in accordance with state statutes.
Claims Handling

Many companies do not get directly involved with their insureds when a claim is filed; instead they send the claim immediately to a third party claims administrator. However, an involved insurance provider will work with a PA throughout the process. A commercial insurer can also be available to answer questions concerning records requests, attorneys’ inquiries and any other claim issues that arise.

If a claim is filed, having access to the most experienced claims professionals can help a PA sort out the issues they will face as they head down the litigation path. From assigning experienced defense attorneys to assisting PAs through pre-suit discovery, medical review panels, depositions, mediations and arbitrations, and, ultimately, the disposition of the case, having an insurer that you can rely upon makes all the difference.

When considering claims, the central question for a PA becomes, if a claim arose, naming him/her, a staff physician and the facility, whose interests would the attorney put first? Should a PA count on his/her physician or healthcare organization’s defense team to always have the PA’s best interests in mind? The answer is NO. PAs need coverage that will protect their interests and career at ALL times, with their own coverage and their own dedicated policy limits.

Managing the Medical Record*

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<tr>
<th>Tips for Good Documentation</th>
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<tr>
<td>1. Each entry should have a date, time and signature of the healthcare provider.</td>
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<td>2. Entries should contain objective, factual information, avoiding personal opinions.</td>
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<td>3. Document important care events and discussions, such as informed consent, followed by</td>
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<td>signing or refusing, and conversations with patients, family members or other</td>
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<td>healthcare providers.</td>
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<td>4. Correct errors by drawing a single line through the entry so that it can be read. Then</td>
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<td>insert the correct information with the time, date and signature.</td>
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<td>5. If an entry is made in the wrong record, draw a single line through the entry, write</td>
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<td>that the information was entered in the wrong record, then include the initials and date.</td>
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<td>6. If a note is partially destroyed, such as a liquid spill on the record, do not destroy</td>
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<td>the damaged record and leave it as part of the medical record. Write another entry with</td>
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<tr>
<td>the exact wording and a statement that it is a duplicate note because the original note</td>
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<td>was damaged and rendered illegible.</td>
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Avoid the following when documenting on the record:

- Amendments to an entry without adding the current date, time and initials or signature.
- Leaving blank spaces to amend later.
- Justification for or extensive explanation of anything done or not done for the patient.
- Accusations against or disagreements with another practitioner.
- Emotionally charged entries.
- Inclusion of personal opinions.
- Negative statements about the patient, family or other healthcare providers.

* “Managing the Medical Record” courtesy of Chartis’s “Medical Malpractice Litigation: A Guide for Physician Assistants.” Physician Assistant Risk Solutions™
Case 1 — Diagnostic Error

Diagnostic errors are the most prevalent medical malpractice claim involving PAs. The most common diagnostic errors occur when PAs fail to order diagnostic tests, report the results to their patients or follow up when testing reveals abnormal findings.

In one case, a 39-year-old woman visited a PA for a physical exam and the PA found a lump in her breast, but failed to diagnose it as breast cancer. During the 2001 exam, the PA pointed out a firm lump in the patient’s left breast, but diagnosed it as a fibrocystic breast formation. Two years later, when the patient saw the PA’s attending physician, she again asked about the breast lump, which had increased in size and become tender. The physician ordered a biopsy, which was positive for breast cancer with lymph node involvement.

As the patient began chemotherapy treatments, she realized the implications of the missed diagnosis could be dire. The time lost in treating the cancer had greatly reduced her chances of remission. She filed a lawsuit against the PA for failure to timely diagnose breast cancer.

The PA argued that the 2001 breast exam was normal – when she had examined the breast lump, she found no signs of cancer and had the patient complained of a breast lump, she would have recorded that on the record and ordered the proper diagnostic tests.

The patient died one year after the suit was filed. A judge denied the PA’s motion for summary judgment based on expiration of the statute of limitations. But because the PA had a medmal policy of her own, she was able to hire her own attorney. After a fair mediation, the parties settled the case quickly for less than $200,000.
Section III: Case Studies (Cont.)

Case 2 — Wrong-site and Wrong-patient Medical Errors
Several years ago, a surgeon and his attending physician assistant had finished their final operation of the day and returned to his office to dictate a report. But as the surgeon began to record, they both realized that they had performed the wrong procedure. They were supposed to perform trigger finger surgery in the right ring finger of a 75-year-old female patient. Instead, they performed a carpal-tunnel release, a common procedure that removes a band of tissue around the wrist.

They had gone through all the necessary steps—they verified the symptoms, the abnormal findings on her physical examination and the informed consent. They confirmed the trigger finger was on the patient’s right ring finger, and the PA even marked it with indelible marker and reviewed the procedure with the patient.

But then the medical team left to perform a carpal tunnel release on another patient. When they returned, the patient’s arm had been washed with soap, alcohol, and iodine—which caused the surgery site-marking to wash off. Plus, the surgeon’s mind was still on the carpal tunnel procedure he had just performed. All of these conditions contributed to the wrong-site, wrong-procedure incident. Upon realizing the grave mistake, the surgeon and PA immediately went to the patient, told her about the mistake and performed the necessary procedure.

Unfortunately, these types of wrong-site, wrong-procedure errors are not uncommon. In fact, 21 percent of hand surgeons said they operated on the wrong site at least once in their career, according to a 2003 survey by the American Academy of Orthopaedic Surgeons. Up to 98,000 Americans die each year in U.S. hospitals from preventable medical errors, and several hospital errors rank in the top 10 leading causes of death, according to the Institute of Medicine. Some 68 percent of error claims are related to orthopedic surgery.

When patients sue after a mistake like this, they typically name as many people as possible in the lawsuit. In this case, the patient filed the claim against the hospital, the surgeon and the PA. The hospital settled and asked both the surgeon and PA to reimburse them for some of the damages paid to the claimant. While the surgeon had a separate medmal policy—in addition to being covered under the hospital’s policy—and was able to reimburse the hospital, the PA did not have his own policy and was unable to repay the hospital.

This PA was relying solely upon the medmal coverage provided by the hospital, when a policy of his own would have provided him with separate limits of liability. While in most cases a PA is covered under the employer’s policy, there are cases when they may find themselves negligent for all or part of the settlement. In addition, had the PA purchased his own medical malpractice policy, he would have been able to hire his own attorney and mount the proper defense against the claim.
Case 3 — Medication Mistakes

Another common scenario in which PAs are named in medical malpractice cases is medication and prescription mistakes.

In one case, a man suffering from chronic obstructive pulmonary disease (COPD) was admitted to the hospital for observation and the PA prescribed bronchodilator drugs. The patient who was sharing his hospital room was battling cancer and receiving a powerful painkiller, along with his cancer-fighting drugs. A nurse inadvertently gave the painkiller to the COPD patient instead of the cancer patient and, within 12 hours, the man with COPD was dead.

The victim’s family sued the hospital and the PA who prescribed the bronchodilator drugs. The hospital admitted liability in this case, but the two parties could not agree on a settlement amount for the victim’s family. Five years later, a jury ordered the hospital to pay the plaintiff’s family $154,000. The hospital paid the settlement and then turned to the PA for partial compensation. Since the PA had not purchased her own malpractice policy, she could not hire her own attorney and defend herself against the claim. She was at the mercy of the hospital’s defense and the lawsuit jeopardized all she worked so hard to accomplish in her career, not to mention the financial impact.

With the right amount of medical professional liability coverage in place, the PA would have been in a better position to prove that she was not at fault for the medication mistake, or to pay all or part of the settlement.

Section IV: Conclusion

Medical malpractice lawsuits are on the rise, according to the American Academy of Physician Assistants (AAPA). Injured patients, either on their own or encouraged by others, eventually take recourse in the courts. Situations involving injuries or damages that generations ago would have been ignored by the injured person are now regularly the basis for lawsuits. Liability is a major risk for medical professionals today, including PAs.

Some PAs falsely believe that if they are named in a malpractice lawsuit, their employer’s coverage will fully defend them. This is not always the case. With employer-provided coverage, limits are oftentimes shared with all defendants; a PA may have no coverage for off-duty incidents; or the coverage may be canceled following a job change. In addition, coverage through an employer rarely includes coverage for defense of a license complaint. Physician Assistants need a policy that covers disciplinary actions that go before state licensing boards, not just malpractice suits, so that legal counsel is covered in both situations.

Given the volatile circumstances of today’s healthcare industry, physician assistants should consider purchasing their own malpractice insurance that goes beyond the limits of their employer-provided plan, and they should consider purchasing from a trusted medical insurance company. A trusted insurer provides direct access to risk management resources that can help PAs prevent lawsuits in the first place and, when a claim is filed, they are there with the most experienced defense attorneys to assist PAs through pre-suit discovery, medical review panels, depositions, mediations and arbitrations, and, ultimately, the disposition of the case.

As with any insurance policy, the most important reason to have professional liability insurance is for peace of mind. As recent court decisions have shown, physician assistants need their own personal advocate, fighting to protect them, their interests and their career.
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REFERENCES