

Preventive Action

Quarterly Risk Management Newsletter for Policyholders of APAC

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Risk Management Guidelines: Preparing for your defense

At some point in time every practitioner will encounter a patient outcome that may become the subject of a malpractice claim. Early preparation is the key. The following is a list of loss prevention measures designed to deter lawsuits before they are pursued and preserve defenses necessary to defeat the unavoidable claim.

Seeking risk management or legal advice whenever encountering:

- Errors
- Untoward results
- Complications
- Patient dissatisfaction or complaint regarding outcome
- Any situation when uncertain how to proceed

In response to a request for medical records:

- Obtain appropriate written authorization for release
- Comply with specificity to the written request or subpoena
- Provide a copy within 10 business days
- Retain original records and x-rays. A court order is necessary to release originals
- **Do Not Alter Anything**

In preparation for a potential claim:

- Document the incident fully
- Describe the complication and efforts of avoidance
- Document the medical management afforded the complication
- Increase communication with the patient and/or family members
- Keep the patient's records separate from other charts
- Create a separate personal file labeled: "Attorney's File – Privileged and Confidential"

be conducted through your medical professional liability insurer and/or your personal counsel.

In response to a Summons and Complaint:

- Notify APAC immediately
- Participate in the assignment of defense counsel
- Remain available to conference with your defense team
- Ask your defense team to copy all correspondence to you
- Designate a contact person

Become your own best expert:

- Conduct medical research
- Evaluate medical literature
- Obtain current seminar material
- Alert your defense teams to any factual discrepancies

Educate your defense team:

- Share your expertise
- Do not hide things
- Confront the downside
- Participate in your defense
- Assist in the selection of experts
- Never contact an expert directly—your attorney will direct communication

Never contact the patient's attorney directly. All communication should

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Anesthesiologists Professional Assurance Company



Anesthesiologists Professional Assurance Company publishes Preventive Action on a quarterly basis as a service to policyholders. Information in this publication does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained in this newsletter are generalized and may not apply to all practice situations. Anesthesiologists Professional Assurance Company recommends you obtain legal advice from a qualified attorney for a specific application to your practice. The information should be used as a reference guide only.

For comments, questions or to obtain additional copies contact the Anesthesiologists Professional Assurance Company Risk Management department at 866-294-6014, ext. 3016.

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Deposition Guidelines:

- Think before you speak
- Never guess. If you don't know—say so.
- Set the pace – do not rush to completion
- Do not characterize your testimony
- Do not volunteer anything
- Tell the truth!
- Don't let attorney put words in your mouth
- Avoid adjectives and superlatives
- “Asked and Answered” – Don't expand
- Listen to your attorney's objections
- Never lower yourself – Don't argue
- Remember that the plaintiff attorney is the opposition

Trial Preparation:

- Seek a continuance when necessary
- Visit the courtroom prior to your trial
- Dress rehearse for contingencies

Trial:

- Your attendance is mandatory
- Be on time
- Maintain a conservative appearance and demeanor
- Do not arrive in luxury vehicles
- Know the facts
- Do not bring electronic devices into court
- Participate in your defense
- Pay attention to every detail
- Convey authority
- Take notes
- Alert counsel to mistakes
- Evaluate performance –

RISK MANAGEMENT PRODUCTS & SERVICES-AVAILABLE AT NO CHARGE TO POLICYHOLDERS

APAC has a number of highly effective risk management products and services. These comprehensive products are designed to avoid claims and disciplinary actions and encourage physician participation. Such products and services are available at no cost to our policyholders.

To obtain any of the risk management reference materials or for additional details, contact the Risk Management department at (800) 741-3742, ext. 3016 or rm@fpic.com. The materials are also available on our website at www.apacinsurance.com –

New Study Urges Low-Tech Solutions for Medication Errors

A new study from anesthesiologists at Penn State Hershey revealed that by simply standardizing the look of medication labels hospitals could significantly reduce the number of medication errors. Researchers testing a simple color-coding system in simulated emergency room situations said the universal system could help prevent some of the 1.5 million adverse drug reactions each year. “Many ‘high-tech’ solutions have been suggested, including use of bar codes, radiofrequency identification for medications, and computerized medication administration processes,” said Dr. Elizabeth H. Sinz, a researcher in the department of anesthesiology at Penn State Hershey. “But besides their high costs, all of these methods have flaws that may produce as many errors as they eliminate. Furthermore, these solutions are often impractical for fast-paced situations in operating rooms or during emergencies.” She also added, “Simple systems, such as the color-coding methods used in our study, are more reliable and useable than complex systems.” (*Forbes*, 10/18/08) —

UK Study Finds Epidural Risk Lower Than Thought

A recent study out of the United Kingdom analyzed 700,000 epidural and spinal anesthetics administered to expectant mothers and patients undergoing surgery and found the risk of harm is less than what is typically estimated. Researchers at Bath’s Royal Hospital found the risk was at least as low as one in 23,000—ten times less than tends to be estimated. The Bath team was given data from each hospital in the UK and found only between 14 and 30 patients were permanently harmed. Researchers could not be exact because in some cases the cause of injury was not completely clear. Most complications were determined to be unavoidable—a result of the patient’s individual reaction to the procedure rather than the way it was preformed. Researchers said expectant mothers, in particular, should not be overly concerned as their risk of permanent harm was as low as one in 80,000. (BBC News, 1/12/09) During the span of the PIAA Data Sharing Project, from 1985 through June 30, 2008, there have been 592 closed claims and 191 paid claims reported relating specifically to epidurals. Improper performance is the most common identifiable medical misadventure for those claims. (*PIAA*, 1/13/09) —

Pennsylvania Medical Center Faces “Disastrous” Effect From \$20.5 Million Judgment

Community Medical Center (CMC) of Pennsylvania will experience a “severe and disastrous effect” if it has to pay all of a \$20.5 million medical liability judgment, according to a recent affidavit by John Nilsson, its interim president and CEO. In November, a Lackawanna County jury ordered CMC

to pay \$8.2 million of a \$20.5 million judgment a Jermyn family received for the medical problems caused by mistakes made during a boy’s birth seven years ago. Richard Behlke, M.D., of Ob-Gyn Consultants in Scranton, must cover the rest. However, Dr. Behlke and Ob-Gyn Consultants have a combined \$2.4 million of basic insurance. That means \$17 million of the judgment is uncovered by medical professional liability insurance. Therefore, under a state law provision known as “joint and several liability,” the plaintiffs’ attorney could push CMC to pay the entire \$20.5 million if the doctor can’t pay. Today CMC is insured for large medical professional liability claims, but a few years ago the facility unsuccessfully rolled the dice with minimal coverage. CMC has appealed the judgment by filing a motion to reverse the decision. The facility is also attempting to obtain a remittitur—a decision that the verdict is excessive along with a reduction in the award. (*The Times-Tribune (PA)*, 1/16/09) —

International Study Finds Surgical Checklist Significantly Reduces Medical Errors

An international pilot study involving hospitals from around the world found using a Surgical Patient Safety Checklist significantly reduces surgical complications and mortality. Studies in industrialized countries have found that major complications occur in 3% to 16% of inpatient surgeries and preoperative death rates for inpatient surgery of 0.4 to 0.8%. The study, led by the World Health Organization (WHO) and Dr. Atul Gawande of the Harvard School of Public Health, launched in October 2007. Eight hospitals located in cities around the world were selected by the WHO and Harvard to pilot a Surgical Patient Safety Checklist as part of the WHO’s “Safe Surgery Saves Lives” initiative. Developed by an international group made up of leading healthcare providers, the WHO Checklist is intended to improve communication among members of the surgical team during surgery and to increase the consistency in using proven standards of surgical care in order to reduce preventable complications and mortality. At three critical points during surgery a member of the surgical team verbally confirms the completion of each step for infection prophylaxis, anesthesia safety, and other essential steps in surgery. Each pilot site implemented the checklist in operating rooms and tracked changes in the rate of inpatient complication or death within 30 days of surgery. Using the checklist, the study found the rate of major complication in the study operating rooms were reduced by more than one-third after the introduction of the checklist. The study also concluded inpatient deaths following operation dropped by more than 40% with the implementation of the checklist. (*Insurance Journal*, 1/15/09) —



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Legal FAQs For information specific to your state of practice, contact APAC's Risk Management department



Is a physician required to have an 'off the record' conversation with a patient's attorney?

No. Not unless the discussion and medical treatment is in direct connection with a workers compensation claim. In such case, seek legal or risk management guidance first, before speaking with the attorney.

What action should be taken when a summons and complaint is received?

Immediately notify APAC by calling the Claims department at (800) 741-3742, ext 3047. If you are served, APAC only has a limited number of days to assign a

defense attorney and prepare a response to be filed on your behalf. It is important to not discuss the case with the patient, the patient's attorney or other parties involved in the care and treatment of the patient. You should gather and secure the patient's records immediately.

What is the recommended procedure for marking spinal surgery cases?

For spinal surgery, we advise a two-stage marking process. First, the general level of the procedure (cervical, thoracic or lumbar) must be marked preoperatively. If the approach involves anterior versus posterior, or right versus left, then the mark must indicate this. Then, intraoperatively, the exact interspace(s) to be operated on should be precisely marked using the standard intraoperative radiographic marking technique. The requirement for the preoperative marking is based on reported cases in which a patient intended for a cervical procedure had a lumbar procedure started, and vice versa.

What is meant by 'latent failure'?

An error which is precipitated by a consequence of management and organizational processes and poses the greatest danger to complex systems. Latent failures cannot be foreseen but, if detected, they can be corrected before they contribute to mishaps.

What is 'vicarious liability'?

A term used to describe the imputation of neglect to another person not directly involved in an allegedly negligent act. Generally, the common law test under which vicarious liability is determined is that of direction or control of another's actions. —