



# Insight & Perspectives

A publication of Sompo International Insurance's Healthcare Practice

We are pleased to offer our latest installment of *Insight & Perspectives*, a newsletter dedicated to sharing healthcare news, trends and developments impacting our brokers and insureds. This installment features ERC Risk Solutions' article *The Buck Stops Here Physician and Office Liability for Clinical and Administrative Staff* exploring the often-unforeseen risks that physicians take on when employing a team-based, collaborative approach to patient care. As always, we appreciate your continued support and thank you for selecting Sompo International Insurance to be a part of your risk and insurance programs.

FALL | 2020

## ABOUT US

Our U.S. and Bermuda teams provide healthcare professional liability coverage to non-profit and for-profit hospitals and other healthcare organizations.

## CONTACT US

### BERMUDA HEALTHCARE

#### Kim Morgan

Senior Vice President,  
Healthcare Practice Leader –  
Bermuda

[kmorgan@sompo-intl.com](mailto:kmorgan@sompo-intl.com)

T +1 441 278 0923

Waterloo House,  
100 Pitts Bay Road  
Pembroke, HM 08  
Bermuda

T +1 441 278 0400

### U.S. HEALTHCARE

#### Kim Willis

Senior Vice President,  
Healthcare Practice Leader – U.S.

[kwillis@sompo-intl.com](mailto:kwillis@sompo-intl.com)

T +1 636 681 1205

16052 Swingley Ridge Road,  
Suite 130  
St. Louis, MO 63017  
United States  
T +1 636 681 1220

If you would like to subscribe to *Insight & Perspectives*, please email us at [communications@sompo-intl.com](mailto:communications@sompo-intl.com)

## THE BUCK STOPS HERE: Physician and Office Liability for Clinical and Administrative Staff

By ERC Risk Solutions, Editor: Margaret Curtin, MPA, HCA, CPHRM, DFASHRM, CPCU SVP, Risk and Client Service, ERC Risk Solutions; [contact@ERCrisk.org](mailto:contact@ERCrisk.org); [www.ERCrisk.org](http://www.ERCrisk.org)

### What Could A Clerical Error Made By A Medical Assistant Mean To Your Practice?

Consider the following scenario: A physician orders a lab test to rule out the potential for a blood-clotting disorder in response to a patient who expresses a desire to begin oral contraceptives. When the lab test results come back, the medical assistant in the practice mistakenly focuses on the reference range, which indicates "Negative," rather than the actual result, which confirms "Heterozygous," meaning the patient does in fact have a clotting disorder. The medical assistant enters "Negative Finding" in the patient's chart.

The physician briefly reviews the chart, noting the "Negative" reference by the medical assistant, and prescribes the patient oral contraceptives. Over a year later, after continuous use of the contraceptives, the patient suffers a pulmonary embolism.

If the patient brings a claim for medical malpractice, the physician and the practice could both be held directly liable.

### Two Theories Of Medical Malpractice Liability

In general, most states recognize two theories of liability in the context of medical malpractice actions: direct liability and vicarious liability.

**Under a direct liability theory, an employer (i.e., the practice group) is generally subject to liability for its potential negligence in the hiring, training and supervision of its staff.**

A negligent hiring and retention claim arises from an employer's failure to hire qualified staff, and/or an employer's failure to terminate underperforming staff. Negligent training claims involve an employer's failure to give staff adequate instructions. An employer can be held liable for negligent supervision if it fails to ensure that staff follow instructions.

**Under a vicarious liability theory, an employer can also be held liable for the negligence of its staff, committed while acting within the scope of their employment.**

In the healthcare context, "staff" not only includes licensed medical providers, but also non-licensed clinical staff (e.g., nurse aides, medical assistants) and non-clinical, administrative staff. This means that in the above scenario, the employer and any individual tasked with the duty to supervise non-clinical staff may be held liable for medical malpractice for the medical assistant's failure to properly catalog the lab result.

Physicians are often surprised to learn that their exposure for medical malpractice liability extends well beyond their own conduct. The rationale stems from well-grounded public policy



that a **physician has ultimate responsibility for the care of their patient. Where the physician delegates that responsibility to a mid-level provider, physician assistant, nurse, or medical assistant, the physician maintains a duty to supervise those individuals, and could be held liable for failing to do so properly.**

### Does Your Office Have Adequate Patient Follow Up Protocols In Place?

Let's look at another example. In this case, a patient calls her physician's office, complaining of two painful lumps in her right breast. She reports that the pain and size of the lumps change with her menstrual cycles. A nurse practitioner advises the patient to monitor the lumps through her next menstrual cycle and if the lumps increase in size come in for an appointment. Instead of calling after her next cycle, the patient calls much later and comes in for her annual exam. At that time, the lumps are still present and the patient is given a mammogram, which reveals findings consistent with stage III breast cancer.

If the patient brings a medical malpractice action for the delay in diagnosis of her breast cancer, the nurse practitioner could be sued. However, if the practice group's protocol was also found inadequate in its standard of care for patient follow-up, the practice group itself could also be found directly liable for inadequate policies and procedures, as well as its failure to properly train and supervise its employee. In addition, the physician, who has ultimate authority for the patient's care, could also be held liable for the failure to supervise the nurse practitioner in appropriately assessing and treating the patient.

In addition to claims arising out of the negligence of clinical staff, claims can also be brought against physician offices and clinics for the failed attempts by non-clinical and administrative staff to triage patient care.

### Proper Training and Enforcement Of Triage Protocols For Non-Clinical And Administrative Staff Can Help Protect Your Practice

In addition to claims arising out of the negligence of clinical staff, **claims can also be brought against physician offices and clinics for the failed attempts by non-clinical and administrative staff to triage patient care.**

For example, if a front desk receptionist advises a patient to see her primary care provider when presented with a potentially emergent patient situation and fails to escalate the review of the patient's care despite the patient's request for earlier treatment, the physician and practice group are put at risk if the delay results in serious harm to or the death of the patient.

... physicians should bear in mind that they have ultimate authority and responsibility for the treatment of their patients.

A practice could be shielded from direct liability by properly training the receptionist to refer the patient to a nurse when a primary care physician is unavailable. Or, if no clinical providers are available, the receptionist could be trained to advise the patient to seek treatment at an urgent care center or emergency department. It's important to note, however, proper training must be supported by enforcement. In the example above, if the receptionist were properly trained but had acted in a manner that contradicted the established triage training and protocols previously without consequences, liability for the physician's practice group could result despite adequate training.

### SUMMARY

While many physician offices and clinics employ a team-based, collaborative approach to patient care, physicians should bear in mind that they have ultimate authority and responsibility for the treatment of their patients. Where this responsibility is delegated to mid-level providers, physician assistants, nurses and non-clinical staff such as medical assistants, physicians should be aware they can still be held liable for their failure to supervise the care and treatment provided. Offices should take the necessary steps to hire qualified personnel, provide their staff with proper instruction, revisit training at regular intervals and ensure their staff are following appropriate protocols in providing patient care.

If you are unsure about or need further assistance in evaluating if your office procedures, training and triage protocols, contact your system or facility risk management department for assistance.