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DOCTORS Rx

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A Letter from the Chair of the Board

Dear Colleague:

As the need for greater access to medical care increases, the use of Physician extenders continues to grow as an option for many practices.

This issue of Doctors RX *focuses on changes in Maryland law with respect to the utilization of Physician extenders, and provides an overview of suggested risk reduction recommendations.*

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Don't Extend Your Risk!
Learn the New Rules Regarding Physician Extenders in Maryland

Medicine is one of the most well-established professions; nevertheless, the practice landscape is ever-changing due to both internal and external forces. There have been numerous legislative efforts designed to improve access to care and reduce Physician workloads, one of which involved the increased use of Physician extenders. The utilization of Physician extenders – Physician Assistants, Nurse Practitioners, and similar professionals – has become a significant part of many Physician practices in recent years. It is a continuing and growing trend. This issue of *Doctors RX* will examine recent developments in the law concerning use of Physician extenders and how these changes impact the Physician practice from a liability standpoint.

Consider the following scenario:

A long-term patient was seen for complaints of anxiety. The patient was seen on three consecutive visits over a period of two months. At each visit, previously prescribed anti-anxiety medications were adjusted due to continued reports of unresolved symptoms. Unfortunately, the patient committed suicide prior to the next scheduled follow-up visit.

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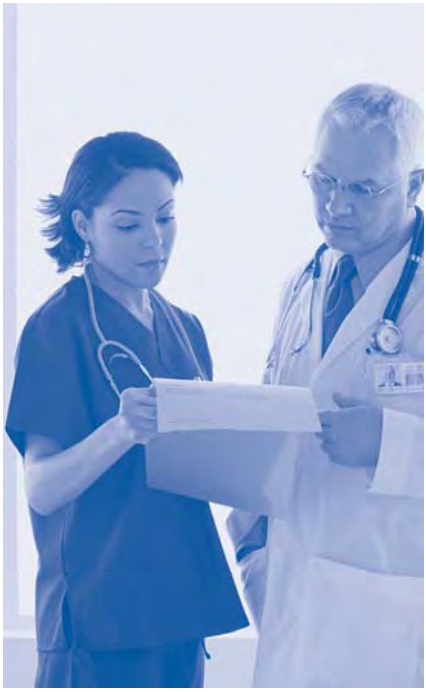
Discovery in the subsequent medical malpractice lawsuit revealed that the patient had been treated by a Physician Assistant employed by the practice. The Physician Assistant was faulted for not conferring with any of the Physicians in the group regarding the patient's level of anxiety; not providing information to the patient or her family on risks and benefits of the medications prescribed; and failing to refer the patient to a psychiatrist. The plaintiff's strongest criticism was levied against the practice for failing to have a policy in place in which to provide appropriate supervision for the Physician Assistant. Specifically, the plaintiff's expert testified that there was never any supervision by any of the Physicians in the group over the Physician Assistant for the entire period of treatment for anxiety.

In a previous issue of *Doctors RX**, we addressed the subject of Physician extenders. Recent changes in the laws concerning Nurse Practitioners and Physician Assistants present us with the opportunity to revisit the topic.



The Basic Theory of Liability Has Not Changed

In the prior *Doctors RX** article, we presented three scenarios in which a patient was seen in a private office by either a Physicians' assistant or a Nurse Practitioner/nurse midwife who allegedly missed a diagnosis with resulting liability for both the Physician extender and the Physician. In the first case, a Physician Assistant allegedly failed to make a diagnosis of squamous cell cancer in a patient who was seen by the Physician Assistant on several occasions over the course of three or four months with complaints of sore throat, laryngitis and hoarseness. In the second, a nurse midwife allegedly failed to contact a Physician when the patient exhibited signs of pre-eclampsia. Ultimately, the patient developed eclampsia which proved fatal both for her and the child. In the third scenario, a Nurse Practitioner was alleged to have missed the diagnosis of breast cancer in a patient who presented several times with complaints of stabbing breast pain and persistent discharge from one nipple.

In all of these cases, the plaintiffs sought to hold the Physicians liable for the conduct of the extenders on a principal/agency theory. Maryland law has long held that a principal or employer will be held liable for the negligent actions or omissions of an agent or employee so long as the agent or employee was acting within the scope of his or her agency or employment. Thus, the Physicians in question faced the prospect of an adverse judgment based upon vicarious liability despite the fact that they were not alleged to have directly engaged in negligent conduct.

Further, in the third scenario, the plaintiffs' attorneys alleged that the Physician had a responsibility to engage in discussions with the Nurse Practitioner on a daily basis with regard to any patient requiring treatment for a serious condition. In that case, the Physician faced the possibility of liability upon allegations of direct negligence in the form of an omission: The failure on the part of the Physician to more closely supervise the extender so as to ensure patient safety.

Both theories of liability – vicarious and direct – remain a possibility whenever a Doctor relies on a Physician extender.

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General Tips for Utilizing Extenders

Know the regulations and professional scope of practice for the Physician extenders of interest.

Develop a written agreement with the Physician extender which conforms to the requirements of the law as set forth above.

Establish your own practice protocol to determine how and under what conditions the extender will work within the practice.

Consider a procedure which ensures that new patients are seen by a Physician on their first visit, at regular intervals (every second or third visit), or when a complaint remains unresolved.

Maintain effective communication with the extender and with the patient. Both formal and informal communications are essential.

Require co-signature for notes as necessary; provide on-site supervision.

Clarify areas of independent practice and shared patient management.

Avoid issues of misrepresentation with regard to the extenders' titles, qualifications and responsibilities. Great care should be taken to make sure patients do not mistakenly believe an extender is a licensed Physician.

Pay particular attention and put in place proper protocol regarding the role of an extender in responding to after-hours and emergency calls.

Be willing to continually evaluate the extender's skill level, practice routines, and compliance with protocols.

For questions regarding Nurse Practitioners, nurse midwives, CRNAs or clinical Nurse Practitioners, contact the State Board of Nursing at 410-585-1900 or 888-202-9861. For Physician Assistants, contact the State Board of Physicians at 410-764-4777 or 800-492-6836.

Recent Changes in the Law

Maryland law recently has been amended, effective October 1, 2010, with regard to collaborative agreements in the cases of Nurse Practitioners and delegation agreements in the cases of Physician Assistants.

With respect to Nurse Practitioners, prior to October 1, 2010, Maryland law required a Nurse Practitioner to enter into a "collaborative agreement" with a Physician before he or she could provide health care services. The agreement had to be filed with, reviewed and approved by both the State Board of Physicians and the State Board of Nursing.

Within the agreement, the Nurse Practitioner had to provide detailed information on his or her background history, such as licensure, education and work experience. In addition, the agreement required information specific to the practitioner's role in the practice, such as the number of patients expected to be seen per shift and a list of common diagnoses for patients seen in the proposed practice setting. Lastly, the agreement was to include details on procedures specific to the practice, including anticipated prescription practices, lab and diagnostic procedures, proposals for medical emergencies, policies regarding referrals and consultations, procedures for review and signing of records, and other matters.

Clearly, the collaborative agreement was comprehensive, to say the least. Not surprisingly, the filing and approval procedures were also viewed as excessive, overly burdensome, and often time consuming.

In 2009 and 2010, a number of interested groups, including the Nurse Practitioners Association of Maryland, the Maryland Coalition of Nurse Practitioners, and the AARP were successful in promoting legislation to amend the law to eliminate the collaborative agreement requirement and to include a scope of practice provision for Nurse Practitioners. Previously, that scope of practice had been set forth as a matter of regulation only.

The legislation passed and was signed into law as Chapter 77 and Chapter 78 of the Laws of Maryland of 2010. This new law amended § 8-101 of the Health Occupations Article of the Annotated Code of Maryland by defining the scope of a Nurse Practitioner's practice, eliminating the need to file a collaborative agreement with either the State Board of Physicians or the State Board of Nursing and repealed the requirement of Board approval of the collaborative agreement. Instead, the amended law provided that a Nurse Practitioner must file only an "attestation" with the State Board of Nursing stating that he or she has entered into an agreement for collaboration and consulting with a licensed Physician, and that he or she will adhere to specific practice standards.

The statute now contains the following provision: § 8-302 (b) (5)

(i) A certified Nurse Practitioner may not practice in the State unless the Nurse Practitioner has an approved attestation that:

The Nurse Practitioner has an agreement for collaboration and consulting with a Physician licensed under Title 14 of this article and will refer to and consult with the Physician and other health care providers as needed, and

The Nurse Practitioner will practice in accordance with the standards of practice of the American Academy of Nurse Practitioners or any other national certifying body recognized by the Board.

(ii) The Board shall:

Maintain an approved attestation, and;

Make the approved attestation available to the State Board of Physicians on the request of the State Board of Physicians.

See Md. Health Occ. Code Ann., § 8-302 (b) (5) (i) and (ii) (2011).

As of the date of this article, the State Board of Nursing has posted the following statement on its web site:

> Statutory changes which take effect on October 1, 2010, have officially eliminated the requirement for Board-approved written collaborative agreements between Nurse Practitioners and Physician collaborators.
>
> In place of the written collaborative agreement, NPs will be filing an "Attestation" document with the Board to declare and affirm that they have a named collaborator and will adhere to the Nurse Practice Act and all rules governing the scope of practice for their certification.

See the Maryland Board of Nursing web site at; http://www.mbon.org/main.php?v=norm&p=0&c=adv_prac/index.html

In addition to the changes in the law for Nurse Practitioners, legislation affecting Physician Assistants was also signed into law in 2010. Chapter 273 and Chapter 274 of the Laws of Maryland of 2010 now require Physician Assistants to be licensed rather than certified by the State Board of Physicians to practice in the State. The law removes the requirement for a delegation agreement between a Physician and a Physician Assistant to be approved by the State Board of Physicians. Finally, the law clarifies the supervisory rules of the primary and alternate supervising Physicians and increases the number of Physician Assistants a Physician may supervise in certain settings from two to four.

See Md. Health Occ. Code Ann. §§15-101 (o) and (r); 15-301 (d) (1) and (2) (2011).

The question remains whether these amendments to the law regarding the filing and Board approval of a collaboration agreement for Nurse Practitioners, and the elimination of Board approval of delegation agreements in the case of Physician Assistants will lessen the potential liability of the Physician who enters into such an agreement with a Nurse Practitioner or a Physician Assistant. Unfortunately, there is no reason to believe this will be the case.

It is very unlikely that the change in the procedural law regarding the filing and Board approval of a collaborative agreement or a delegation agreement will be seen as a change in the substantive law with respect to the degree of supervision and oversight that is expected of a Physician who is "collaborating" with a Nurse Practitioner. The same is true with respect to the extent to which a collaborating Physician may be held liable for the actions of a collaborating Nurse Practitioner.

With regard to Nurse Practitioners, it is important to consider that the new law has not eliminated the requirement of a collaborative agreement in concept or in practice; it merely eliminates the requirement that such an agreement be filed with and approved by the respective boards. Thus, the law still requires a collaborative agreement as the Nurse Practitioner must attest to the existence of the agreement when he or she files an "attestation" with the State Board of Nursing. The amended law does not set forth the contents of a collaborative agreement in any detail and changes to § 10.27.07.02(B) of the Code of Maryland Administrative Regulations (COMAR) went into effect on July 11, 2011 that repealed former language that contained a detailed description of what should be contained in an agreement.

When considering these recent statutory and regulatory changes, the question arises whether and to what extent these changes affect the potential liability exposure of a Physician entering into an agreement with a Nurse Practitioner.

To the extent a Nurse Practitioner is an employee of the Physician or the Physician's group, the new law regarding the filing of an attestation will not change the Physician's or the group's potential liability as the principal or the employer of the Nurse Practitioner. The Physician or the group will remain vicariously liable for the negligent to the amendments to the law.

To the extent a Nurse Practitioner is a non-employee, a Physician can still be held directly liable as the result of

having entered into a collaborative agreement with a non-employed Nurse Practitioner for failing to closely supervise the Nurse Practitioner. The question of whether the Physician has acquired an obligation or legal duty to the patient, and the further question of whether the Physician has met his or her duty to the patient, will not be affected by the elimination of a requirement that the collaborative agreement be filed and approved by the Boards. So long as all other factors that could give rise to a legal duty are still in place, the Physician's potential exposure will be the same.

In the case of Physician Assistants, the delegation agreements are no longer required to be approved by the State Board of Physicians; however, the delegation agreements are required to be **filed** with that Board. More to the point, they must still exist and govern the relationship between the Physician Assistant and the Physician. Further, they must include a clear statement of responsibility on the part of the Physician for the actions of the Physician Assistant. The law clearly states that the delegation agreement contain the following:

§ 15-302. Delegation Agreement

(b) The delegation agreement shall contain:

(1) A description of the qualification of the primary supervising Physician and Physician Assistant;

(2) A description of the setting in which the Physician Assistant will practice;

(3) A description on the **continuous Physician supervision mechanisms** that are reasonable and appropriate to the practice setting;

(4) A description of the delegated medical acts that are within the primary or alternate supervising Physician's scope of practice and require specialized education or training that is consistent with accepted medical practice;

(5) An attestation that all medical acts to be delegated to the Physician Assistant are within the scope of the practice of the primary or alternate supervising Physician and appropriate to the Physician Assistant's education, training, and level of competence;

(6) **An attestation of continuous supervision of the Physician Assistant by the primary supervising Physician** through the mechanisms described in the delegation agreement;

(7) An attestation by the primary supervising Physician of the **Physician's acceptance of the responsibility for any care given by the Physician Assistant;**

(8) A description prepared by the primary supervising Physicians of the process by which the **Physician Assistant's practice is reviewed** appropriate to the practice setting and consistent with current standards of acceptable medical practice;

(9) An attestation by the primary supervising Physician that the Physician will respond in a timely manner when contacted by the Physician Assistant; and

(10) Any other information deemed necessary by the Board to carry out the provisions of the subtitle.

See Md. Health Occ. Code Ann. § 15-302(b) (2011).

As the highlighted portions above make clear, the statute that sets forth the requirements of a delegation agreement between the Physician and the Physician Assistant includes repeated references to "continuous Physician

supervision mechanisms," and "attestation of continuous supervision of the Physician Assistant by the primary supervising Physician," and "the Physician's acceptance of the responsibility for any care given by the Physician Assistant." It would be difficult to imagine a clearer statement of intent on the part of the legislature to make the Physician responsible, and thus liable, for the conduct of the Physician Assistant. In the event the Physician Assistant's conduct is held to be negligent (either by affirmative act or by omission), that "responsibility" of the Physician would translate into "liability" for injuries suffered by the patient as a result of that negligent conduct.

What should you do to mitigate your risk? Consider the following:

> If you are entering into a collaborative agreement with a Nurse Practitioner or a delegation agreement with a Physician Assistant, be familiar with the provisions of law regarding the substance of such agreements.
>
> Be certain you can meet the requirements of the law regarding the substance of such agreements.
>
> Be certain that the Nurse Practitioner or the Physician Assistant with whom you are entering into an agreement is properly qualified and certified and capable of practicing in accordance with the appropriate standards.
>
> Be aware of the standards governing the conduct of the Nurse Practitioner or the Physician Assistant and the parameters of his or her scope of practice as required by the new laws.

The use of extenders is fairly common, and probably will become more so over time. As the laws are eased with regard to filing requirements and other procedural matters, it is important that those changes not be mistaken for a signal that the substantive law has been eased or modified, or that the Physician's duties, and thus his or her potential liability, arising out of the use of extenders has been eased correspondingly. The use of extenders can be a desirable means of providing quality health care at reduced costs, but only when done in compliance with the law.

Doctors RX

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Risk Management Questions	ext. 224 or 169
Main Fax	410-785-2631
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Web Site	www.weinsuredocs.com

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