

COVER YOUR ASSETS: MY EMPLOYER HAS MY BACK (RIGHT?)



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DISCLOSURES

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DISCLAIMER

- I am one of the more recent members of the Insurance Subcommittee

- Novice in terms of what I know about liability insurance

- Not a lawyer
 - Definite answers to your specific questions should be addressed by a lawyer

- My inexperience with liability insurance and my subsequent education is one of the motivations of this talk
 - Answer the question of whether you need liability insurance

OUTLINE

- Outline
1. Introduction
 2. Strategies on how to answer these questions for yourself
 3. Case example of University of New Mexico
 4. Guidance on whether to report errors
 5. Conclusion

ROLE OF MEDICAL PHYSICIST

Role of Medical Physicist

- Ensure accuracy
- Protect patients
- Protect Public (i.e. shielding)

Despite all of our efforts: What if something "falls through the cracks"?

Video: Physics.com
The group report is 107 pages.
The report of Task Group 190 of the AAPM: Application of risk analysis methods to radiation therapy quality management
by Gagliardi, Jennifer A.; Khan, Sherif S.; Dunbar, John C.; Chinn, Geoffrey S.; Clark, Keith J.; Martin, Sara S.; Gardner, John S.; ... See all authors. →
First published: 13 June 2014 | <https://doi.org/10.1118/1.2487367> | Cited by: 88

SCOPE

"Minor errors"

- Generating action plans to avoid repeating the mistake
- Procedural lapses, documentation inconsistencies
- Internal reporting to risk management
- No harm to patient
- Keep back, bend mistakes overtime

But what if something really goes wrong?

- Injure patient
- Violated license
- Legal fallout

It may not matter how much you have good rapport with administration, when lawyers get involved:
Does your employer have your back?

STRATEGIES ON HOW TO KNOW YOU NEED PERSONAL LIABILITY INSURANCE

Outline

1. Introduction
2. Strategies on how to answer these questions for yourself
3. Example: University of New Mexico
4. Guidance on whether to report errors
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WHAT IS MEDICAL LIABILITY (OR MALPRACTICE) INSURANCE?

- Protects health care professionals from liability associated with wrongful practices resulting in bodily injury, includes:
 - Medical expenses: bodily injury, mental anguish
 - Property damage
 - Legal defense cost
- The complexity involved in discovering negligence results in a higher percentage of premium dollars going toward defense and cost containment expenses.
- Insurers spend substantial funds investigating and defending claims where there is an adverse patient outcome not resulting from negligence.

SO WHAT IF SOMETHING GOES WRONG?

- Time to answer these questions is before you need to.
- Think about what will happen sooner rather than later, don't let the opportunity to protect yourself pass you by



Real reason ~~dinosaurs~~ went extinct

a medical physicist

DO I NEED INSURANCE?

- Coverages usually assumes:
 - You are acting within the scope of your job
 - You are not doing anything criminal
 - Won't cover 'moonlighting'
- Medical Physicists may be a tempting target
 - Victims of our own success
 - Because we well compensated for our services
 - Our errors could have broad impact
- What you need in terms of coverage depends on the type of employment.



TYPES OF EMPLOYMENT RELATIONSHIPS

- Independent consulting
 - On your own
 - Need some sort of insurance
- Consulting group
 - Group usually has a policy that covers employees
 - However that coverage could be shared and not cover all the potential liability to yourself
 - You may want to supplement that coverage
- Private hospital (similar to consulting group)
 - More employee across different specialties
 - Variation in the pools of risks
 - You may want supplement that coverage

Private sectors have deeper pockets

TYPES OF EMPLOYMENT RELATIONSHIPS

- Public/State/Fed. Government hospital
 - Suing the medical professionals is like suing the government
 - There are entire office of your government entity to deal with such claims. In New Mexico it is the Office of Risk Management and for HIPPA violations the Civil Rights Office
 - There are typically laws in place to cap damages
 - Little need for your own liability insurance
 - However, there may be exceptions some county and university hospitals are self-insured a representative from your risk management department can give you details about your coverage and steps to take if a claim is filed or an incident occurs.

EMPLOYER'S PROFESSIONAL LIABILITY INSURANCE COVERAGE LIMITED COVERAGE

- Coverage is often a shared limit
- Multiple employees are covered under the same aggregate (total annual) limit.
- If one employee is involved in a claim and uses the insurance, it could exhaust the limit of the policy or leave little leftover to cover any other claims that may arise for another employee.
- An employer's policy also only covers you for the work provided during working hours.
- However, the coverage may not follow you if you leave your employer



<http://funny-stuff-and-cute.com/funny-pictures.php?title=blanket-is-too-small&id=10397>
 Professional liability insurance, ensures that you maintain coverage

BENEFITS OF GETTING PERSONAL LIABILITY INSURANCE

- Sleep better at night: you aren't at risk of being underinsured.
- Flexibility to choose the limits of coverage you want – and the full limit applies to you and only you, up to the limits of the policy.
- Plus, you'll have legal representation with your interests in mind, not those of the employer.
- Additional people can be added to your policy for a small additional premium
 - May be advantageous in cases where you are training outside of work
 - Or you have an assistant working alongside you.

BENEFITS OF GETTING PERSONAL LIABILITY INSURANCE

- Coverage applies to you personally no matter when (i.e. off-the-clock) or where you are
- Covered:
 - when providing inadvertent advice
 - if you change employment.
 - Many policies will cover the work you do in the future, and the work you did in your previous employment.
- If maintain insurance continuously, you can ensure coverage for claims that may arise at any point in time, no matter when that incident may have occurred.
- Again ask yourself:
 - Do you have enough insurance to pay the expenses that you will be liable for?
 - Are you relying on your employer's group professional liability insurance to cover you?
- Purchasing an individual policy can be a save your assets
- Cheap investment for peace-of-mind

SOURCES OF INFORMATION


- Sometimes your HR departments will have dedicated lawyers who would be able to answer your questions
 - Be careful, they may want to know "why are you asking? (very suspicious)
- Risk management department, again be wary they may be suspicious
- Contact medical physics colleagues
- AAPM has a whole subcommittee that is dedicated to these sort of questions
- Lawyer (\$\$)
- Insurers (note obvious conflict of interest)

EXAMPLE: UNIVERSITY OF NEW MEXICO

Outline

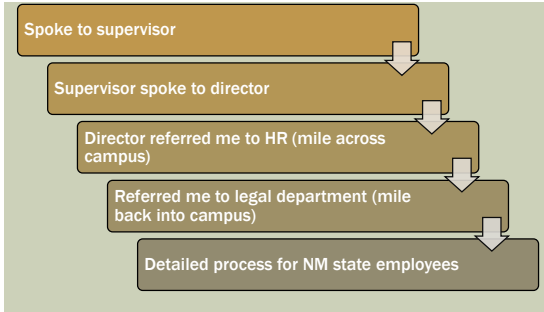
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DOES MY UNM HAVE MY BACK?

- Asked my staff and administration, there was no clear answer.
 - Overall sentiment is that "I am sure I will be fine"
 - I have a good relationship with my boss that should cover me!
- 
- However when lawsuits come, lawyers do not care.
 - Opposing counsel will be working for their client
 - Administration's ability to protect their staff is independent to how much you are liked by your boss
 - As much as you may not like it, lawyers have ways to force you to throw your colleagues "under the bus"

However there are laws to protect internal quality insurance correspondence and apologies to the patients

METHOD



SUMMARIZATION

- Therapy physicists are not UNM faculty
- Employed under a physician billing group, called UNM-Medical Group
- Despite this caveat, technically state employees
- "The state is your insurance company:" Taxpayer funded insurance
- "If you sue us, you are suing the state:"
 - Detailed in NM tort claim act
 - Covers all activities as long as you working within the scope of duties
- Most (all?) states have a backstop with a cap on damages

NM CLAIM PROCESS

- First step is the injured party, i.e. patient, files a notice of claim. 2 year window to file a "discovery statement"
- UNM will launch an investigation of the validity of the claim and prioritize (next slide)
- UNM will decide to either deny or resolve the claim
- If UNM denies the claim, there are 2 years file a lawsuit from the date of discovery
- Event is filed in the state risk department for the state of NM

PRIORITIZATION

- Small claims are immediately settled with a standard payment
- Simple example:
 - Anesthesiologists sometime crack teeth while intubating a patient
 - If the patient brings a claim, it is usually settled by the cost of repairing a tooth
 - More traumatic, amputating the wrong leg
- What if the damages are larger, there are limits on the damages
- If the university disputes the claims the state's risk department gets involved and takes the case to trial,
 - Throughout the entire process the employee pays nothing.

STATE OF NEW MEXICO DAMAGES

- Damages are limited by law:
 - \$200,000 for each legally described real property for damage..."
 - \$300,000 for all past and future medical and medically related expenses
 - \$400,000 to any person for any number of claims arising out of a single occurrence for all damages other than real property damage and medical and medically related expenses
 - Shall not exceed \$750,000
 - An additional \$300,000 for loss of "consortium for family members who have claims. These are not medical damages. This covers things like lost time from work, household services, loss of time with the patient, etc..."
 - Total: \$1,050,000 allowable
- Such suits are sent NM General Services Department, Risk Management
- HIPPA is an exception: HIPPA goes to the Civil Rights Office

GUIDANCE ON WHETHER ON WHETHER REPORT ERRORS

Outline

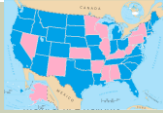
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SAYING YOU ARE SORRY TO A PATIENT

Saying you are sorry to a patient
=
Apologies Statutes

APOLOGIES STATUTES

- Laws that allow medical professionals to apologize to patients with the provision that the apology may not be used in lawsuits failed to limit medical malpractice liability risk
- Changes rules of evidence and excludes from trials statements of apologies, condolence, or sympathy made by healthcare workers to patients
- Vary from state to state



States that have apologies statutes (blue)



National Conference of State Legislatures



State	Statute
Alaska	Statute 18.05.010
Arizona	Statute 12-2001
Arkansas	Statute 26-51-101
California	Statute 99.003
Colorado	Statute 13-20-101
Connecticut	Statute 36a-400
Delaware	Statute 19
Florida	Statute 76.061
Georgia	Statute 33-24-1
Hawaii	Statute 321-1
Idaho	Statute 39-2601
Illinois	Statute 230/1.1
Indiana	Statute 36-31-1
Iowa	Statute 222.1
Kansas	Statute 65-1001
Kentucky	Statute 304.130
Louisiana	Statute 9:2801
Maine	Statute 17-A:101
Maryland	Statute 5-101
Massachusetts	Statute 8B:101
Michigan	Statute 330.101
Minnesota	Statute 145.01
Missouri	Statute 201.01
Montana	Statute 2-101
Nebraska	Statute 78-101
Nevada	Statute 633.01
New Hampshire	Statute 251:1
New Jersey	Statute 17:27
New Mexico	Statute 24-1-1
New York	Statute 263.1
North Carolina	Statute 90-101
North Dakota	Statute 14-01-01
Ohio	Statute 4707.01
Oklahoma	Statute 63-101
Oregon	Statute 31.001
Pennsylvania	Statute 501
Rhode Island	Statute 26-101
South Carolina	Statute 39-1-1
South Dakota	Statute 43-101
Tennessee	Statute 26-1-1
Texas	Statute 75.001
Utah	Statute 78B-101
Vermont	Statute 26:101
Virginia	Statute 54.1-101
Washington	Statute 70A.05.010
West Virginia	Statute 20-2-1
Wisconsin	Statute 89.01
Wyoming	Statute 2-101

CAN I SAY I AM SORRY?

- For sure, you can speak to your supervisor and colleagues. That is considered within internal QA practices and there should be no reprisals for that (think whistle blower laws)
- Speaking to patients about errors could—depending on the state—be used as evidence.
- Speaking to others, i.e. loved ones, about errors — without patient's permission— is a HIPAA violation

HOW DO I KNOW WHEN TO SAY I AM SORRY?



- “Apology laws are intuitively appealing but empirically unfounded”
- “Many times malpractice lawsuits are expressions of anger, previous studies have shown”
 - As a response “law makers in 32 states plus DC have enacted apology laws, hoping that apologies might be enough to resolve cases without legal intervention
- “I am sorry believers”, lowers probability of being sued.
 - Vanderbilt study says it doesn’t help
- “An apology could be the first and only indication that something went wrong. It ‘might transport a signal’ ... By apologizing, the doctor tells the patient he screwed up when the patient previously did not know that” and... the patient may decide to file a lawsuit based off of that information
 - “The can’t use the apology itself, but knowing something went wrong, they can look for other evidence that they can use”

Apology laws don't help doctors avoid malpractice payouts

NEED TO BE CAREFUL

- Need to be careful on how you talk with patient,
 - Difference between EMPATHY and APOLOGY
 - Always need to be empathetic!
 - Apology is admitting fault... need to be careful
- There is some dispute on whether to apology
- But, as I tell my kids it's the right thing to do...
- So there is an art to balance and apology

EMPATHY VS. APOLOGY

"Today, we are going to learn the difference between empathy and apology. If I said to Mary here, 'I'm sorry you spilled coffee on your lap,' most people—not just medical professionals—would say I just apologized to Mary. After all, I used the word sorry in my statement to Mary. But I didn't apologize—I empathized! 'I'm sorry you spilled the coffee in your lap, and I feel bad you have to go home and change your outfit' is 100 percent empathy. Apology, on the other hand, would sound like this: 'I'm sorry I knocked your coffee over and it has spilled on your lap, let me pay for your dry cleaning bill.' Both statements used the word sorry, but one was about feelings and staying connected (empathy), while the other was about admitting fault and making amends (apology). Yet, medical professionals in particular are petrified of sorry in any context because you've been told for so long never to utter it. 'Don't say you're sorry, or you'll buy the hospital a lawsuit' has been the traditional mantra of risk and legal professionals. Yet sorry is one thing patients and families want most post-event, and it's not necessarily "sorry we screwed up" but "Sorry this happened, and we still care about you." Empathy is absolutely critical to staying connected with patients and families after an event. If you stay connected, your chances of litigation are dramatically reduced."




- FOCUS ON PATIENT:
 - “There is a benefit to the patient and family to help the resolve grief” • Disclosure literally turns anger into understanding and reconciliation.”

ROILS

- ROILS was coordinated response by ASTRO and AAPM in response to some heavily publicized treatment errors
- One of the greatest concerns that one may have is the risk of making your experience public, could the disclosure come back to hurt you?
- Am I exposing myself to liability if I disclose through ROILS?
- Accrediting bodies may be at risk
- How much do we talk to regulatory authorize.
- ROILS, totally unanimous?
- Do you want to report an error to your superior?
 - Exemption for quality assurance, cannot be forced to disclose information used here
 - Usually, there is an agreement that limits the scope of internal QA
- Opinion: despite these questions (and it may be bad legal advice) it is the "right" thing to do! Need to ensure that the accident isn't repeated for other patients



CONCLUSION

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CONCLUSION

- It is in your best interest to figure out your liability exposure
- No matter how good your relationship is with colleagues, things will change when lawyers get involved
- Universities and State/Government have legislation backstop
- Other employment arraignments, you will need to look into your coverage
- Reporting a mistake is an ethical decision regardless of the legal ramifications



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PHD DABR

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Thank you!
