



OCCUPATIONAL HEALTH PHYSICAL THERAPY: LEGAL AND RISK MANAGEMENT ISSUES GUIDELINES

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PREFACE

Over the last quarter of a century, there has been a dramatic increase in the frequency and severity of malpractice claims. In the last decade, there has also been a corresponding increase in the litigation associated with the practice of occupational medicine. Guidelines: Occupational Health Physical Therapy Guidelines: Legal and Risk Management Issues was created to help physical therapists to develop effective risk management strategies in this unique practice environment.

INTRODUCTION

The role of the physical therapist in Occupational Health continues to expand and evolve in response to increased incidence and costs of work related injuries/illnesses. With these changes in the physical therapist's role, there are changes in risk exposures as well. These include, among others, malpractice and ordinary negligence liability.

Physical therapy malpractice generally involves liability for physical therapy injury in situations involving a therapeutic relationship, i.e. where the recipient of the intervention is an individual patient/client. "Ordinary negligence liability" applies to all other circumstances including most occupational health consultations done by physical therapists on behalf of employers or client companies. Ordinary negligence is covered under an Errors and Omissions policy. The purpose of risk management programs is to reduce the frequency and severity of incidents that can lead to claims thereby reducing the probability of malpractice and other litigation.

These guidelines are intended to identify key risk management issues and offer advisory guidance on how to deal with the specific situations presented in occupational health. The therapist practicing in the arena of occupational health must also consider risk management issues that are common to standard practice. To obtain specific information, consult the American Physical Therapy Association (APTA) publications *Risk Management for Physical Therapists: A Quick Reference* and the compendiums *Ethics in Physical Therapy Parts I & II* and *Law & Liability Parts I & II*.

In developing effective risk management strategies, physical therapists should determine with whom the relationship (or relationships) exists. Physical therapists may have relationships with client companies, individual patient/clients, and reimbursement entities, among others. The physical therapist may have concurrent relationships, e.g., with a client company and an individual worker for the client company. These relationships may present different and even competing responsibilities. Choosing the optimal risk management practice strategy depends in large part on the nature of the relationship(s).

According to the *Guide to Physical Therapist Practice*, the elements of patient/client management include examination, evaluation, diagnosis, prognosis, and intervention. In Occupational Health Physical Therapy, the following services are examples of these elements:

Examination - Patient/client history, systems review, and tests and measures, job-task analysis, worksite/workstation analysis, and examination of the worker/workforce, functional capacity evaluation (FCE).

Evaluation, Diagnosis and Prognosis - Clinical judgments based on the data gathered for identification of at-risk employees, identification of at-risk work processes or workstations, determination of plan of care, and goals and outcomes.

Intervention - therapeutic exercise including ergonomics analysis, alteration, and training, job coaching, education, and functional training including return to work case management and work hardening/work conditioning.

The content of this guide should not be construed as legal advice. All physical therapists are advised to proactively seek legal advice from personal or institutional attorneys, and/or risk managers for specific practice issues.

LEGAL CONSIDERATIONS

Multiple Claims

Physical therapists should recognize that individuals who file claims for one purpose might file additional claims for other purposes (e.g. a worker's compensation claimant might initiate a personal injury, medical malpractice, or additional worker's compensation claim during the course of intervention.)

Risk Management Strategies:

1. Work within the physical therapist scope of practice and professional competence.
2. When appropriate, maintain separate files for personal injury claims and each worker's compensation claim.
3. When documenting individual patient/client behaviors, document only those things observed. Avoid disparaging remarks which could lead to claims of defamation (e.g. "malingerer") or clinical labels which you might not be qualified to make (e.g. "patient/client is depressed"). Document only the intervention and avoid comments related to "secondary gain" or its origin.
4. Avoid expansion of services at the individual patient's/client's request unless approved by appropriate referral sources and an additional examination/evaluation is performed.

Malpractice (professional negligence)

When an individual patient/client and physical therapist relationship is established, a special duty of care is owed to the patient/client. Physical therapists performing patient/client interventions should ensure that their methods are accepted, safe, justifiable, and comply with the standards of care (see *Guide to Physical Therapist Practice*). Physical therapists who hold professional credentials in another discipline(s) should be advised to review state/jurisdiction practice acts to ensure that their activities are covered by an appropriate practice act.

Consent

Prior to any physical therapy intervention, the physical therapist is responsible for informing the patient/client of the benefits, costs, and substantial risks (if any) of the recommended intervention and the treatment alternatives (*Guide for Professional Conduct*, Section 2.4, Patient/Client Autonomy and Consent).

When the physical therapist's primary relationship is with the patient/client, the information to be communicated includes:

- Nature of intervention
- Material risks of serious harm/complication due to the intervention
- Goals of interventions
- Reasonable alternatives

It is prudent, in attempting to inform the patient/client, for a physical therapist to solicit and respond to his/her questions. The physical therapist should attempt to make sure that the patient/client understands all directions and/or advice.

It may be advisable for the physical therapist, whether the primary relationship is with the subject of the FCE or some other party, such as an employer, to obtain from the subject of the FCE a signed and dated statement that the physical therapist informed him/her of the risks associated with undergoing an FCE.

When the physical therapist's primary relationship is with the employer of the subject of an FCE or some other interested party, then it is advisable to obtain from the subject a signed and dated permission for the physical therapist to disclose to the employer or other interested party all information relevant to the FCE.

Communicating with individuals who speak a different language or who are hearing-impaired presents special challenges. The physical therapist should arrange to have interpreters present as needed. It may be beneficial to develop translator networks within practice settings/areas.

Pro Bono

Pro Bono work is subject to the same legal and practice standards as compensated practice.

Licensure

Referral:

Review your state practice act to determine under what circumstances you need a referral. Some states do not allow any practice of physical therapy, including risk reduction/prevention, health promotion, wellness, and fitness without a referral.

Practice in Multiple States:

Therapists working in Occupational Health may be called upon to perform services for which they need to be licensed in multiple states. Before providing any kind of services, you should review the applicable state practice act to determine parameters. In addition to patient/client intervention, examples of services may include:

- direction and supervision
- delivery of educational programs patient/client-related instruction
- consultation

Consultation or other services provided through any electronic method (telephone, fax, e-mail) are generally considered to be practicing physical therapy in the state of the individual receiving the services. For additional information, review of the following articles is recommended:

Bennett J. Practicing across State Lines - Part 1 [Liability Awareness]. *PT- Magazine of Physical Therapy*. 1997; 5(1): 32-36.

Bennett J. Practicing across State Lines - Part 2 [Liability Awareness]. *PT- Magazine of Physical Therapy*. 1997; 5(2): 22-25.

Medical Records

Storage:

In an industrial or business environment, medical records must be kept in locked files and separate from human resource records. There are also state-specific legal guidelines for retention of medical records by employers. Physical therapists are advised to proactively seek legal advice regarding these laws.

Disclosure:

Specifics regarding disclosure of medical information in workers compensation cases vary from state to state. Review your state statutes for details. When disclosing medical information, be sure to eliminate information that is not statutorily authorized without written consent of the patient/client.

Expert Witness

Physical therapists may be called upon to be a witness or expert witness in the practice of Occupational Health. To effectively manage your risk, refer to the information provided on this topic in the appendixes of Part 1 of APTA's compendium Law & Liability.

SCOPE OF PRACTICE

Occupational Safety and Health Administration (OSHA)

Maintaining OSHA records and rendering compliance advice for employers are not within the physical therapist's scope of practice.

Violation of the Pharmacy Act

Advising patient/clients about prescriptions/over-the-counter medicine may give rise to adverse administrative actions for violation of pharmacy practice acts. Exercise caution before rendering advice to patient/clients about prescription drugs/over-the-counter medicines. Do so only in accordance with state and federal law, including physical therapy and pharmacy practice acts, and personal scope of competence. Avoid dispensing over-the-counter medications (e.g., aspirin, Tylenol, Advil, and Aleve).

Product Liability

Physical therapists that manufacture and/or place products into the "stream of commerce" should recognize that they might incur liability for problems associated with their products. With regard to products made for use in physical therapy practice, physical therapists might also incur liability risk if they fail to regularly calibrate/repair these items or if they use products inconsistent with their intended purposes.

Potential Immunity from Lawsuit

Worker's Compensation:

As an occupational health physical therapy consultant to an employer, you may share the employer's protection from an employee's lawsuit for workplace injury under a state's workers

compensation statute. Review applicable workers compensation statutes and consult with risk management and legal advisors for state-specific advice.

Return to Work Issues

Follow the "Guidelines for Evaluating Functional Capacity" when reporting FCE results including returning injured employees to work. When acting as a consultant for transitional work return program design, limit your recommendations to your scope of practice as a physical therapist. On written documents you may consider including a disclaimer statement. Avoid recommendations regarding human resource issues, worker's compensation law, or other laws. These recommendations are outside the scope of physical therapist practice.

Environmental Considerations

Working in varying environmental conditions, such as in extreme temperatures, varying lighting conditions, and noisy environments, may be essential functions of workers' job. Additional qualifications may be required for a therapist to comment on whether or not an individual can safely perform the specific requirements of a job within these environments.

PREVENTION & WELLNESS

Group Education

When conducting group education as a result of a consultative agreement, do not provide or recommend individual therapeutic interventions without first conducting screening examinations. Refer to the *Guide to Physical Therapist Practice*, Other Professional Roles: Consultation.

Providing an intervention without prior examination is indefensible practice, subjecting a physical therapist to malpractice liability for patient/client injury.

Prevention Services

When performing prevention services, it is critical to ensure that you do the following:

1. Review the state practice act and determine if it allows you to provide prevention services without a referral. If not, obtain appropriate referral or cease service provision.
2. Ensure that the activities you are providing fall within the state practice act definition of physical therapy.
3. Develop policies and procedures for prevention programs.
4. Objectively document your prevention activities to include all interventions and the duration of time spent in activities. Maintain these records for the time period required by state and federal law as applicable.
5. Report facts in an objective, systematic manner.
6. Ensure you have the requisite knowledge base to provide prevention services in business or industry.

Wellness

If a person utilizing a physical therapist-owned fitness facility has an incident that results in harm, this incident would most likely not be covered by the physical therapy professional liability policy unless there had been a direct physical therapist and patient/client relationship. In the situation where there was no physical therapist and patient/client relationship, the physical therapy owner needs a "wellness" professional liability policy as a source of coverage. This type of policy is common in the fitness facility community. Contact your carrier to determine the extent of your current coverage, and to find out whether or not you need any additional types of coverage.

CONTRACTS

Contracts/Agreements

Although an enforceable contract does not need to be in writing, therapists are urged to clarify the responsibilities of both parties through formal written contracts. Therapists need to recognize that there is a difference between a consultative agreement and an arrangement that creates a patient/client and provider relationship. For further information on this topic, refer to Law & Liability: Part 2: Professional Issues and consult a local attorney who is knowledgeable in contract law.

Insurance Risk Sharing

Agreeing to take on financial risk incident to delivery of professional services (such as performing services for a percentage of cost savings) may violate state insurance laws. Insurance laws are state specific, therefore seek legal advice before agreeing to take on financial risk incident to delivery of professional services (e.g. performing services for a percentage of cost savings).

Performing a Functional Capacity Evaluation

However, the therapist is responsible and liable to ensure that he/she is practicing within their scope of practice, performing testing in a non-discriminatory and safe manner, performing safe tests, informing the patient/client of the risks associated with the FCE, and using valid testing procedures.

Duty to Report/Consult

Occupational health physical therapists have an affirmative duty to report to appropriate agencies, findings required by state or federal law to be reported. These may include indices of patient/client physical abuse, communicable diseases, and injuries incurred while using equipment, among others.

CONCLUSION

Occupational health physical therapist professional activities carry with them potential liability and safety risks and concerns that must be anticipated and addressed by practitioners and managers. These include, among others, malpractice and ordinary negligence liability exposure, potential adverse administrative actions, practice ethics issues, financial risk exposure, and operational safety concerns. There is a fine balance between optimizing the quality of occupational health physical therapy services delivered to multiple potential clients and minimizing personal risk exposure. This guide presents a 2-part model for decision making and overviews key occupational health physical therapy risk management issues. The intent is to provide guidance for practitioners, managers and interested others.

APPENDIX

In occupational health, physical therapists work with issues that deal with specific statutes or regulations. Familiarity with the following is essential for the occupational health physical therapist:

Americans with Disabilities Act (ADA)

Occupational health physical therapists should be familiar with the ADA and its key titles and definitions. Title I addresses employment issues and includes definitions for the key terms "disability," "reasonable accommodation" and "essential (job) elements". These issues are critical

in occupational health physical therapy. For further guidance, see the ADA (42 USC Section 12101-12213) or contact the Equal Employment Opportunity Commission (EEOC), the federal administrative agency responsible for the ADA. Physical therapists should also be aware that the ADA interfaces with worker's compensation. The EEOC has issued a specific guidance memorandum on this subject.

Workers Compensation Law

Physical therapists should be aware of the rules regarding documentation, disclosure, and confidentiality. In worker's compensation the terms "impairment" and "disability" vary in definition from state to state, according to statutory and regulatory laws. State-specific workers compensation statutes generally provide an exclusive alternative to litigation for work-related injuries/illnesses. For more information, contact your state division of workers compensation.

Federal Employers' Compensation Act (FECA)

The Federal Employers' Compensation Act is the "workers' compensation system" for federal employees. Physical therapists working with federal employees should become familiar with this act.

Federal Employers Liability Act (FELA)

The Federal Employer's Liability Act covers railroad and airline employees. Physical therapists working with railroad and airline employees should become familiar with this act.

Other "Disability Compensation" Laws

Physical therapists should be aware that some classes of workers are covered under other disabilities compensation systems than worker's compensation. An example is the Longshore and Harbor Workers Act.

REFERENCES

Bennett J., Practicing across state lines Part I: Liability awareness. *PT- Magazine of Physical Therapy*. 1997; 5(1): 32-36.

Bennett, J., Practicing across state lines Part II: Liability Awareness. *PT- Magazine of Physical Therapy*, 1997; 5(2): 22-25.

Guide to Physical Therapist Practice, Second Edition. Phys Ther. 2001; 81: 9-744.

Guidelines for Evaluating Functional Capacity. Alexandria, VA: American Physical Therapy Association; 1998.

Guidelines for Programs for Injured Workers: Work Conditioning and Work Hardening. Alexandria, VA: American Physical Therapy Association; 1995.

Guidelines: Occupational Health Physical Therapy: Evaluating Functional Capacity (BOD G11-01-07-11) Alexandria, VA: American Physical Therapy Association, 2001.

Guidelines: Occupational Health Physical Therapy: Physical Therapist Management of the Acutely Injured Worker (BOD G03-01-17-56) Alexandria, VA: American Physical Therapy Association, 2001.

Guidelines: Occupational Health Physical Therapy: Work Conditioning and Work Hardening Programs (BOD G03-01-17-58) Alexandria, VA: American Physical Therapy Association, 2001.

Guidelines: Occupational Health Physical Therapy: Work-Related Injury/Illness Prevention and Ergonomics (BOD G03-01-17-57) Alexandria, VA: American Physical Therapy Association, 2001.

Professional Learning Series, *Law & Liability, Part 1: Liability Issues*. Alexandria, VA: American Physical Therapy Association; 1999.

Professional Learning Series, *Law & Liability, Part 2: Professional Issues*. Alexandria, VA: American Physical Therapy Association; 1999.

Risk Management: Pearls for Physical Therapists. Alexandria, VA: American Physical Therapy Association and American Society for Healthcare Risk Management of the American Hospital Association, 1999.

Guidelines: The Role of the Physical Therapist in Occupational Health (BOD G03-01-17-59) Alexandria, VA: American Physical Therapy Association, 2001.