

Healthcare Providers Service Organization

Risk Advisor for Healthcare Business Owners

How did my employee make that mistake?

A physical therapist (PT) grabs the wrong weight to use when conducting a functional capacity exam for a patient with an injured arm and a pre-existing neck injury. The patient suffers a cervical herniation and has to undergo spinal fusion surgery. The PT is sued—and as the owner of the clinic, so are you.

The PT is an outstanding employee*, so you're shocked. But even a standout employee can be the victim of "inattentive blindness," which is the failure to see something unexpected. In this example, the PT was expecting a certain label on the weight and didn't notice the difference in heaviness before using it.

From a risk and patient safety perspective, you want your staff to avoid these mistakes. Here's how you can explain inattentive blindness to your employees.

The "invisible gorilla"

In the classic 1999 experiment of inattentive blindness, researchers asked students to watch a video of two teams passing basketballs. The students had to silently count the number of passes made by team members in white shirts and ignore the number of passes made by those in black shirts. Halfway through the video, a student wearing a gorilla suit waded into the scene, stopped, faced the camera, and thumped her chest before walking off. Amazingly, about half of the students failed to see the gorilla. They were too busy concentrating on their task. (To see the invisible gorilla video, go to www.theinvisiblegorilla.com/videos.html.)

Think of inattentive blindness another way: We see what we expect to see. Consider the requirement of having two people verify an insulin dosage. The second nurse knows her colleague is competent, predisposing her to expect the dosage to be correct and miss the fact it is wrong.

Awareness of what factors contribute to inattentive blindness is a first step towards reducing it. Research-

ers point to several factors: capacity, expectation, and mental workload.

Capacity. Drugs, alcohol, fatigue, stress, and age can affect people's capacity to pay attention. In a healthcare system where sleep deprivation is common, fatigue is an important consideration.

Expectation. Confirmation bias is one aspect of expectations. We are drawn to evidence that supports a belief or expectation and tend to ignore or dismiss one that doesn't. If a therapist has watched a patient climb stairs three times without incident, he or she might expect the patient to do well the fourth time and miss a hesitancy that precedes the fall.

Mental workload. Your employees are more vulnerable to inattentive blindness if their attention is diverted to a secondary task. For example, Jane may be talking to a physician on the phone and fail to notice that her patient has picked up a weight that is too heavy. Healthcare providers value the ability to multitask. Yet studies show that people are more effective if they focus on one task at a time. Let employees know that when performing those passive stretching exercises, for example, they should focus on what they are doing with their current patient or task and not on the list of tasks yet to be accomplished.

"Invisible gorillas" in healthcare

You can help protect your patients from errors and yourself and your employees from litigation by considering factors that contribute to inattentive blindness. Being aware of this risk can help you minimize errors and increase safety.

*Throughout the newsletter, "employee" denotes any provider working for the healthcare practice whether this be an employee or independent contractor.

This article has been edited for space. To read the full article with resources, visit www.hpso.com/newsletterB13.

How to prepare for a deposition

Your worst nightmare has come true: You and one of your healthcare staff in the practice you own have been subpoenaed to give a deposition as part of a lawsuit. The lawsuit says the healthcare provider's delivery of heat therapy resulted in a significant burn for the patient. Allegedly, you failed to provide sufficient guidance for the healthcare provider by not having a procedure in place for this type of therapy.

You certainly aren't the first healthcare business owner to be named in a lawsuit. Employers are often held liable for the conduct of their employees, even if the employer played no role in the harm. Employers are "vicariously" liable under the doctrine of respondeat superior for negligent acts employees commit during the course of their employment.

However, this is the first time you've had to face the situation. You know your employee will be anxious about giving a deposition. You're getting nervous just thinking about being questioned by an attorney. How can you help ease both your own and your employee's anxiety?

Think of how you prepare your budget for the next fiscal year. You take time to review your financial statements, anticipate future expenses, and assess trends in the healthcare environment so your budget meets your company's needs. Likewise, you need to prepare for a deposition so you can feel confident in your ability to be an effective witness. If you aren't well prepared for your deposition, the plaintiff's (opposing) attorney could easily challenge the legal defense your attorney has crafted for you. In fact, a poor showing at a deposition is the most common reason for an unsuccessful defense.

Defining a deposition

A deposition is a legal proceeding for gathering information from someone named in a lawsuit or who is a witness in a lawsuit. Depositions occur in the discovery phase of a lawsuit—the investigative process that takes place after the complaint is filed and before the trial.

Depositions are key in a jury trial. Juries in medical malpractice trials want to hear the defendant describe what happened. Furthermore, during the trial you will be held to the facts you gave at your deposition. During a deposition, which usually takes place in the plaintiff attorney's office, you will testify under oath. A

12 tips for giving a deposition

- Listen carefully and think before you speak. Don't be pressured into rushing a reply.
- Speak slowly and clearly and answer courteously.
- If you need to consult the medical record, ask to do so.
- If your attorney objects, stop speaking.
- Don't look at your attorney when a question is asked; this is your testimony.
- If you don't know the answer to a question, say so instead of guessing.
- If you don't remember something, say so.
- If you don't understand a question or word being used, don't answer; ask for clarification or rephrasing.
- Answer only the question asked; don't anticipate further questions.
- Understand the theme of your case: You should know every allegation being made against you and the best responses to be made for the defense.
- Be confident and self-assured. If you need a break or drink of water, ask for it.
- Tell the truth.

court reporter will record your testimony verbatim, and you may be videotaped.

Understanding the plaintiff attorney's goal

The plaintiff's attorney will try to restrict you to one version of the incident or facts so your trial testimony is consistent with what you said during the deposition. The plaintiff's attorney may also try to maneuver you into testifying inconsistently by rattling you or undermining your credibility, while assessing your strengths and weaknesses as a witness.

Preparing for the attorney meeting

The most important step to prepare for the deposition is to meet with your assigned attorney. Usually, the preparation meeting is held about a month ahead of the deposition and follows at least one face-to-face meeting where you learn about the details of the lawsuit, including the specific allegations being made.

Before the preparation meeting with your attorney, thoroughly review what led up to the case. You and your employee should review the medical record. As

the healthcare provider, your employee should consider all aspects, including her notes and the treatment plan. It may be wise to help the employee develop a timeline showing the chronology of care she provided. To the best of your employee's recollection, discuss with your attorney what he or she recalls of the incident.

Creating a defense "theme"

Your attorney will work with you to create a "theme" for your defense. For example, perhaps you had a procedure for heat application in the procedure manual, but had not specifically educated staff about it. The theme might be that even though staff education wasn't provided, the information was easily available to employees.

In the case of your employee, it might be that she failed to document that she told the client to stop the heat therapy at a certain time and the client failed to do so. In this case, the theme might be that even though the paperwork may have suffered, care to the client did not.

Keep the theme in mind at all times during the deposition so the plaintiff's attorney doesn't pressure you into making statements that don't support your case. Finally, your attorney will review guidelines you should adhere to when you give your deposition (see *12 tips for giving a deposition*).

You will also meet with your attorney the day of the deposition to discuss any last-minute concerns. Your attorney will be with you through the entire deposition. Remember to dress professionally because first impressions count.

How to prepare your defense before a regulatory board

Another instance where you may need to speak to an attorney is to defend yourself when someone makes a claim against an employee's license. Many healthcare providers are not familiar with license protection. License protection is needed when someone (client, client's family, colleague, or employer) files a complaint with a licensing or regulatory board against a healthcare provider's license. In essence, an action taken against a healthcare provider's license differs from a professional liability claim in that it may or may not—as in the case of professional misconduct—involve allegations related to patient care.

Preparing is key

To help you better understand the deposition process, CNA, the insurance carrier for the NSO and HPSO programs, has created a video, *Preparing for a Deposition*. For more information, visit www.hpso.com/business-owners/resources/deposition-preparation-video.jsp.

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Updated NP malpractice claim report sees average payments on the rise

Nurse practitioners have gained greater autonomy. In filling the role once filled by physicians, as the primary care provider, they find themselves named more frequently in lawsuits.

NSO, in collaboration with CNA, found that from 2007 to 2011, average indemnity (judgments and settlements) payments **increased by 19%** within 5 years. In 2009, the reported average indemnity was \$186,282. This latest analysis indicates an average indemnity of \$221,852.

You can find the entire *Nurse Practitioner 2012 Liability Update: A Three-part Approach* report at www.nso.com/npclaimreport2012.

Is Your Staff Consulting, Teaching, or Training?

Your professional liability insurance policy provides coverage for medical incidents that result in injury or damage. But, losses that arise from staff providing services on behalf of your healthcare business such as consulting, teaching, or training activities, or through expert testimony, would not typically be covered by your professional liability insurance policy. For only \$25 per employee, the Consulting Services Liability Endorsement can be added to your professional liability insurance policy. Contact HPSO at 1-888-288-3534, Monday through Friday, 8 am to 6 pm, EST.

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The latest paid claim analysis addresses risks pharmacists face in daily practice

The latest publication addressing risk in the practice environment is focused on pharmacists. This is another in a series of several published reports delivered to the healthcare practitioner community to identify and address the risks practitioners face in their practice environment.

NSO and HPSO in collaboration with CNA, our insurance underwriting partner for the program, has published its latest report covering a 10-year period of settled professional liability claims. The report is aimed at educating pharmacists on the risks they face daily delivering care to their patients. In addition to the quantitative analysis, the report includes an analysis of license protection defense claims, highlights from the HPSO work profile survey and risk control recommen-

dations, including a self-assessment checklist.

In total, there have been eight ground-breaking reports published since 2005. The reports focus on nurses both RN and LPN/LVN; nurse practitioners; physical therapists; and now pharmacists. The insights provided to practitioners on professional liability allegations and average payments can only help to increase their awareness of opportunities to be named in a lawsuit or called before a licensing or regulatory board. To access any one of these studies:

For RN and NP studies, go to www.nso.com/nursing-resources/claim-studies.jsp

For PTs and pharmacist studies, go to www.hpso.com/resources/claim-studies.jsp.

