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3 **OCCUPATIONAL HEALTH PHYSICAL THERAPY:**
4 **LEGAL AND RISK MANAGEMENT ISSUES GUIDELINES**
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6 *Rescinded as APTA guidelines in May 2011, adopted by Orthopaedic Section BOD July 11, 2011*
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9 **PREFACE**
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11 Over the last quarter of a century, there has been a dramatic increase in the frequency and
12 severity of malpractice claims. In the last decade, there has also been a corresponding increase
13 in the litigation associated with the practice of occupational medicine. Guidelines: Occupational
14 Health Physical Therapy Guidelines: Legal and Risk Management Issues was created to help
15 physical therapists to develop effective risk management strategies in this unique practice
16 environment.
17

18 **INTRODUCTION**
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20 The role of the physical therapist in Occupational Health continues to expand and evolve in
21 response to increased incidence and costs of work related injuries/illnesses. With these changes
22 in the physical therapist's role, there are changes in risk exposures as well. These include,
23 among others, malpractice and ordinary negligence liability.
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25 Physical therapy malpractice generally involves liability for physical therapy injury in situations
26 involving a therapeutic relationship, i.e. where the recipient of the intervention is an individual
27 patient/client. "Ordinary negligence liability" applies to all other circumstances including most
28 occupational health consultations done by physical therapists on behalf of employers or client
29 companies. Ordinary negligence is covered under an Errors and Omissions policy. The purpose
30 of risk management programs is to reduce the frequency and severity of incidents that can lead to
31 claims thereby reducing the probability of malpractice and other litigation.
32

33 These guidelines are intended to identify key risk management issues and offer advisory
34 guidance on how to deal with the specific situations presented in occupational health. The
35 therapist practicing in the arena of occupational health must also consider risk management
36 issues that are common to standard practice. To obtain specific information, consult the American
37 Physical Therapy Association (APTA) publications Risk Management for Physical Therapists: A
38 Quick Reference and the compendiums Ethics in Physical Therapy Parts I & II and Law & Liability
39 Parts I & II.
40

41 In developing effective risk management strategies, physical therapists should determine with
42 whom the relationship (or relationships) exists. Physical therapists may have relationships with
43 client companies, individual patient/clients, and reimbursement entities, among others. The
44 physical therapist may have concurrent relationships, e.g., with a client company and an
45 individual worker for the client company. These relationships may present different and even
46 competing responsibilities. Choosing the optimal risk management practice strategy depends in
47 large part on the nature of the relationship(s).
48

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

52
53 Examination - Patient/client history, systems review, and tests and measures, job-task analysis,
54 worksite/workstation analysis, and examination of the worker/workforce, functional capacity
55 evaluation (FCE).

56
57 Evaluation, Diagnosis and Prognosis - Clinical judgments based on the data gathered for
58 identification of at-risk employees, identification of at-risk work processes or workstations,
59 determination of plan of care, and goals and outcomes.

60
61 Intervention - therapeutic exercise including ergonomics analysis, alteration, and training, job
62 coaching, education, and functional training including return to work case management and work
63 hardening/work conditioning.

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

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LEGAL CONSIDERATIONS

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Multiple Claims

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

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Risk Management Strategies:

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

88

Malpractice (professional negligence)

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

97

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99

Consent

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

104

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

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

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

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

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

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

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Pro Bono

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

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Licensure

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Referral:

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

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Practice in Multiple States:

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

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

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

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

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

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162 **Medical Records**

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164 **Storage:**

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

170

171 **Disclosure:**

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

177

178 **Expert Witness**

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

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184 **SCOPE OF PRACTICE**

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186 **Occupational Safety and Health Administration (OSHA)**

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

190

191 **Violation of the Pharmacy Act**

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

199

200 **Product Liability**

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

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208 **Potential Immunity from Lawsuit**

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210 **Worker's Compensation:**

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

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

216

217 **Return to Work Issues**

218

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

225

226 **Environmental Considerations**

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

232

233 **PREVENTION & WELLNESS**

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235 **Group Education**

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

240

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

243

244 **Prevention Services**

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

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

259

260 **Wellness**

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

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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

326 in occupational health physical therapy. For further guidance, see the ADA (42 USC Section
327 12101-12213) or contact the Equal Employment Opportunity Commission (EEOC), the federal
328 administrative agency responsible for the ADA. Physical therapists should also be aware that the
329 ADA interfaces with worker's compensation. The EEOC has issued a specific guidance
330 memorandum on this subject.

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333 **Workers Compensation Law**

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

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340 **Federal Employers' Compensation Act (FECA)**

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

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345 **Federal Employers Liability Act (FELA)**

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

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349 **Other "Disability Compensation" Laws**

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

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354

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