
Lunch & Learn

Understanding How to Legally Protect your License

June 5, 2019

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Presented in partnership by:

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TCPi Transforming Clinical Practices Initiative

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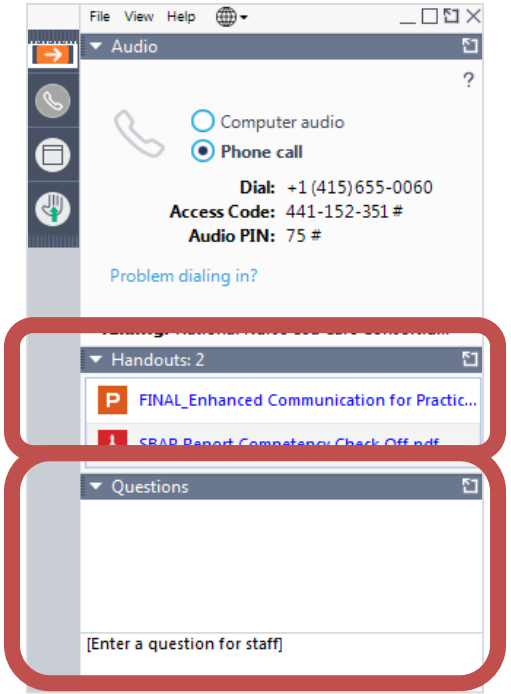

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National Investment in Quality Improvement

- Changes to the health care system are here
- Nurse practitioners (NPs) will play a key role during the critical transition from Fee-for-Service to **Value-Based Reimbursement**
- **NNCC** and the **AANP** have partnered together to create the **Nurse Practitioner Support & Alignment Network (NP SAN)**:
  - Prepare NPs for the upcoming changes to the health care system
  - Provide free continuing education & professional development centered around value-based health care practices
  - Offer key training opportunities that ready practices for **Value-Based Reimbursement**

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Preparing NPs for Value-Based Reimbursement

What is the Quality Payment Program?

Began in 2017 as a result of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) and requires CMS by law to implement an incentive program referred to as the *Quality Payment Program*, that provides for <u>two</u> participation tracks:

Merit-based Incentive Payment System (MIPS)]

MIPS

If you decide to participate in MIPS, you will earn a performance-based payment adjustment through MIPS.

OR

Advanced Alternative Payment Models (APMs)

Advanced APMs

If you decide to take part in an Advanced APM, you may earn a Medicare incentive payment for participating in an innovative payment model.

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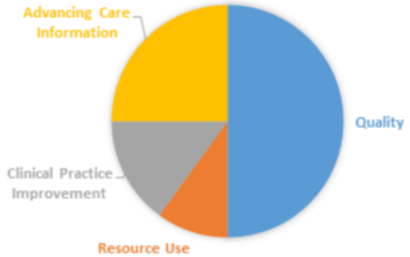
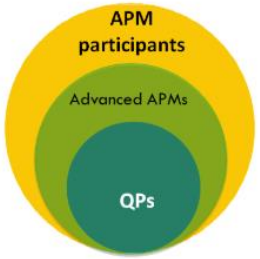
MIPS vs. APMs



[MIPs vs. APMs Timeline]



- Designed for individuals & small practices
- Four (4) performance areas
- Replaces all current incentive programs
- Exempt if practice DOES NOT meet low volume threshold.

- Higher risk model
- Risk is shared throughout the APM
- Number of acceptable payment models is limited
- Rules to being considered a qualified provider (QP)

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Where Can I Go to Learn More?

1. **CMS QPP website** — www.qpp.cms.gov
2. **NPI Lookup for participation status** — https://qpp.cms.gov/participation-lookup
3. **AANP** — https://www.aanp.org/legislation-regulation/federal-legislation/macra-s-quality-payment-program

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UNDERSTANDING HOW TO LEGALLY PROTECT YOUR LICENSE

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OBJECTIVES

- Participant shall be able to name what is necessary to file a malpractice lawsuit
- Participant shall be able to describe the steps of a disciplinary action
- Participant shall be able to name four risk management strategies to prevent malpractice and/or a disciplinary action

ELIMENTS OF A LAWSUIT

Duty

Breach

Cause

Damages

Common Terminology

Tort: a civil wrong or wrongful act

Negligence: failure to act as an ordinary prudent person would under similar circumstances

Negligent nondisclosure: the failure to completely inform a patient about his treatment

More Terminologies

- **Assault**: fear that one is going to hurt you
- **Battery**: the unauthorized touching of a person by another
- **Breach**: infraction or violation of a law, obligation or a standard
- **Statute of limitation**: law that sets forth the length of time within which a person may file a specific type of lawsuit

Top Five Geographic Locations

- Florida
- California
- New York
- Massachusetts
- Pennsylvania

Process of a Malpractice Lawsuit

- Complaint Filed
- Statute of Limitations—Varies from state to state
- Case filed
- Depositions and discovery
- Trial or settlement

Purported Reason for Increase

- Changes in insurance markets
  - Fewer carriers
- Poor litigation laws
  - Current tort laws vary from state to state
  - Litigious society
- Changes in NP scope of practice
- More autonomy

Disciplinary Action Governing Law

- Each state has governing board(s) for nurse practitioners stated in its nurse practice act
- Grounds are usually stated generally as unprofessional conduct, which includes almost anything from incompetence or gross negligence to unprofessional conduct outside of work

Who Can Make a Report to the BRN

- Patient
- Employer
- Friend
- Employee
- Criminal conviction automatically
- Any breathing body or the above of a deceased

What Happens Next?

- Phone call or letter from BRN or governing body
- Call attorney who is knowledgeable on NPs
- Prepare for meeting with investigator
  - Resume
  - Evaluations
  - Letters of reference

What Happens Next?

- Give names and numbers of witnesses
- Statement (written and reviewed by attorney)
- Be TRUTHFUL!
- Meeting may be tape recorded

What Happens Next?

- Case dismissed or goes to Attorney General
- Option to go to Hearing
- License can then be dismissed, suspended, revoked, revoked with stay, fine or public admonition

What Does NP Do?

- Inform BRN in process of hiring attorney who will contact them., DO NOT try to explain what happened
- Do not discuss with anyone
- Find attorney who understands NP law
- Disclose everything to your attorney, including any arrests
- Attorney and NP
  meet with investigator

What Does NP Do?

- Wait 3 months to a year to receive decision
- If case goes to Attorney General, another 2–5 years
- Defend at Hearing or Settlement but must have evidence

What Happens After Disciplinary Action?

- Reported to National Practitioner Data Bank. NP can respond online.

- Receive a letter from Office of Inspector General with restrictions to Medicare and Medicaid

Common Mistakes

- DUI or misdemeanor is expunged or dismissed
  - Still have a rap sheet
  - Arrest automatically goes to BON
  - No Miranda right before an arrest
- Talking too much
- Believing case is over
- Lying

Preventing Disciplinary Actions.

- Don’t say never or always
- Pause after every question
- If your attorney objects, stop answering until you are told to respond
- Know your scope of practice
- Know the Nurse Practice Act
  - Process protocols vs. disease oriented
  - Collaborating physician

Preventing Disciplinary Actions

- Education and Training
- Rule out worst diagnosis first
- If in doubt collaborate and document
- File incident reports with all pertinent information
- Patient relationships—non compliance
- Follow-up—tests, appointments
- Don't speak to police without an attorney present
- DOCUMENT, DOCUMENT, DOCUMENT

Risk Management Issues

- Sentinel event
- Systems' errors
- Recollection of event
- They threw me under the bus
- Cloning
- Not documented, not done
- Addendums considered late charting

CNA/NSO Nurse Practitioner Claims Study 2017

- Majority of claims office practice setting (81.7%)
- Most common allegation scope of practice (22.2%)
- Two thirds of claims in license defense closed with no action taken
- Link CNA study

CNA/NSO Claims Study

- Severity of Allegation categories
  - Diagnosis-related 32.8%
  - Treatment and care management 22.3%
    Medication (prescribing) 29.4%
  - Scope of practice 4.2%
  - Assessment 6.3%

Rules to Avoid Malpractice

- Red flag complaints and conditions
- Rule out the worst thing first
- Risk factors calling for screening tests
- Following up diagnostic tests and referrals
- Revisiting unresolved problems

Rules to Avoid Malpractice

- Prescribing "must do's"
- Adopt a system and policies for follow ups
- Audit EHRs
- Treat every medical opinion you give as if it were rendered during an office visits
- If a patient doesn't really need something don't order it
- Last but one of the most important tips

  Document, document, document

Malpractice/Disciplinary Insurance

- Most employers do not provide disciplinary insurance
- Most employers provide claims made rather than occurrence malpractice
- If your employer insures you, you have no decision making powers
- Occurrence claims
- Support of Nurse Practitioners
- Choice of attorneys for disciplinary actions
- Limits of malpractice and disciplinary actions
- Covers NP for disciplinary actions as well as malpractice
- Allows NP to have own lawyer to negotiate terms
- Occurrence policy covers you after you leave a job

Comparison of top malpractice carriers

	Proliability	NSO	CMF Group
A.M. Best Rating of Insurance Carrier Stability	A, Excellent	A, Excellent	A++, Superior
Insurance Carrier Experience	8 years	26 years	7 years
Coverage for Deposition Representation Limits	$5,000	$10,000	$5,000
Defense of Nursing License Limits	$25,000	$25,000	$25,000
Commitment to Risk Education	Minimal	Extensive	Minimal
Endorsed by The Association of Nurse Attorneys			

BASIC PRINCIPLES IN REPRESENTATION

- Attorney interview
  - Ask about experience
  - Check out credentials
  - Background representing NPs
- Discussion of fees and costs
  - Accept insurance
  - Fees beyond insurance
- Mitigating evidence/witnesses for defense
  - Everything is confidential with your attorney

BASIC PRINCIPLES IN REPRESENTATION

- Expert witnesses
  - Credentials
  - Forensics
- Dialogue with prosecuting attorney/investigator
- Preparing for the hearing
- Preparing the for the outcome
  - Settlements
  - Administrative ruling/boards ruling

Legal Issues

- Determining Scope of Practice
  - State Nurse Practice Act
  - Certifications
  - No certifications
  - Document didactic and clinical
  - Document collaboration

Case #1

- A 43-year-old male had been a patient of a family practice for over five years, making many office visits during that time.
- He had a medical history of hypertension, anxiety disorder, depression, back pain and frequent upper respiratory infections, and a social history of pack-a-day smoking and minimal use of alcohol.
- The patient's blood pressure was often in the 130-140/80-100 mmHg range, consistent with stage I hypertension. Blood testing revealed high cholesterol (triglycerides 219 mg/dL) and elevated calcium levels, while pulmonary function testing showed moderately severe obstruction, a sign of possible emphysema.
- Although the patient's hypertension was recognized, his principal medical challenge appears to have been his pulmonary status.

Case #1

- The patient typically presented with respiratory illnesses, including sinusitis, bronchitis, ear infections and upper respiratory infections, with occasional complaints of back pain.
- He was regularly medicated for hypertension, as well as respiratory infections, nicotine addiction, acid reflux disease, anxiety and depression.
- Based upon the health information record, smoking, stress and diminished physical activity appear to have contributed to his hypertension.
- He was prescribed anti-hypertensives, antibiotics for his respiratory infections and a nicotine patch, but was consistently noncompliant for financial reasons.
- He was also urged repeatedly to stop smoking.

Case #1

- The insured nurse practitioner was employed by the family practice and treated the patient, as did all members of the medical group, which included physicians, nurse practitioners and physician assistants.
- The patient called the office and requested an appointment due to cough, chest congestion and a sore throat. Later that day, the patient presented to the nurse practitioner with complaints of upper back pain/spasm, a cough, chest congestion and a sore throat.
- His blood pressure was very low (95/58 mmHg), and a repeat blood pressure remained low at 100/68 mmHg.

Case #1

- A spirometry (i.e., pulmonary function) test revealed moderate to severe obstruction.
- The insured diagnosed him with bronchitis, upper respiratory infection with cough, pharyngitis (ruling out strep), and thoracic pain secondary to muscle spasm.
- She prescribed an antibiotic, a cough suppressant and an anti-inflammatory, wrote an order for an X-ray of the thoracic spine and again advised him to stop smoking.
- It appears that the thoracic X-ray was never done.

Case #1

- Two days later, the patient returned to the office and was seen by a physician, who recorded the visit as a “Follow up for bronchitis, still sick.”
- The patient’s blood pressure had risen to 141/86 mmHg and upper respiratory symptoms had improved only 50 percent.
- Spirometry testing continued to show moderate obstruction with low vital capacity and auscultation of his lungs, producing wheezing and bilateral rhonchi.

Case #1

- A complete blood count was drawn in the office, revealing an elevated white count and decreased volume.
- The physician's differential diagnosis was bronchitis versus possible pneumonia.
- The patient was given an intramuscular injection of corticosteroid and instructed to continue his antibiotic therapy.
- The physician also prescribed a bronchodilator and a corticosteroid and ordered a stat chest X-ray.

Case #1

- After leaving the medical office the patient proceeded to an outpatient diagnostic imaging center for the chest X-ray.
- The radiologist read the film as: “Compatible with pneumonia, due to patchy bilateral lower lobe infiltrates. Cardiac silhouette not enlarged. The pulmonary vessels are normal.”
- However, the aorta was not described. The results of the X-ray were reported to the ordering physician by telephone and the dictated report was mailed two days later.

Case #1

- The morning after the physician office visit, the patient was found unconscious at home.
- He was taken by ambulance to a local emergency department (ED) where he was asystolic and not breathing, according to records.
- He was pronounced dead on arrival at the ED. A postmortem autopsy recorded the cause of death as cardiac tamponade due to ruptured aortic dissection.

Do You Think The NP Was Negligent?

- Do you believe the nurse practitioner was negligent?

Case #1

- The widow filed a lawsuit against several treating providers, including the insured nurse practitioner.
- The chief allegation against the NP and her collaborating physician was failure to diagnose an acute aortic dissection based upon the signs and symptoms presented in the days before the patient's death.
- The claim averred that the providers' mismanagement prevented medical and surgical interventions that could have saved the patient's life.

What the Experts Said

- Defense experts found that the nurse practitioner's actions were within the standard of care.
- The experts stated that the patient's back pain was consistent with prior complaints, and in any event, it was not the type of severe pain usually associated with an aortic dissection.
- The experts also testified that the patient's low blood pressure at the time of his office visit was more than likely a result of his respiratory illness and not the aortic dissection.

Case #1

- There were several codefendants in the case, including the radiologist, the last treating physician, the physician practice that employed the nurse practitioner and the nurse practitioner.
- Given the positive expert opinions, a motion was filed for partial summary judgment on behalf of the nurse practitioner.
- However, the motion was denied by the court. The professional liability insurance provider then defended the nurse practitioner in court, and the codefendants also took their respective cases to trial.

The Resolution

- At the end of the trial, the plaintiff demanded that the jury consider an award of $6,437,404, including $1,187,404 in lost earnings, $5 million for loss of parental guidance for the couple's two children and $250,000 for pre-death pain and suffering.
- After more than two weeks of trial testimony, the jury returned a defense verdict. Thanks to the successful legal defense, no indemnity payment was made on behalf of the nurse practitioner, although expenses exceeded $350,000 over the nine years of litigation.

- *Figures represent only the payments made on behalf of our nurse practitioner and do not include any payments that may have been made by the NP's employer or payments from any co-defendants. Amounts paid on behalf of the multiple co-defendants named in the case are not available.*

Risk Control Recommendations

- A complete and accurate health information record is the best legal defense. If a patient is chronically noncompliant, providers should protect themselves against potential liability by documenting these behaviors and demonstrating the patient's pattern of resisting medical advice.

Risk Control Recommendations

- The following measures can help enhance both patient compliance and legal defensibility in the event of a claim:
- Document all patient-related discussions, consultations, clinical information, treatment orders made and other actions taken, including the supporting rationale and decisionmaking process.
- Adhere to relevant documentation standards, including state and local regulations, professional organization guidelines and employer protocols. If these differ, follow the stricter requirements.
- Review the recommended care plan with patients and have them confirm in writing that they agree to the plan and understand their responsibilities.
- Discuss potential barriers to compliance with treatment recommendations, including financial/insurance concerns and logistical issues.

Risk Control Recommendations

- Talk to patients about the importance of compliance, and document this discussion in the healthcare record.
- If noncompliance continues, provide a written description of the potential harmful consequences. Ask patients to sign the document, then give them a copy and place the original in the healthcare information record.
- Assess the risk involved in continuing to provide care to chronically noncompliant patients. In some cases, it may be necessary to suspend or terminate the practitioner-patient relationship, in accordance with written practice policies.
- If patients are noncompliant for financial reasons, discuss available options, including manufacturer drug-provision arrangements, state and local agencies, and federal assistance programs.

Case #2 (License Defense)

- The allegation against our Nurse Practitioner was that they engaged in the unlicensed practice of medicine by treating patients without proper direction by a physician.
- The nurse practitioner was licensed as a registered nurse in 1985 and as a nurse practitioner in 1994 and an insured of NSO since 1997.

The Complaint

- **The complainant** was the Board of Barbering and Cosmetology (BBC). The BBC filed a complaint against the salon advertising themselves as a MediSpa where monthly the nurse practitioner provided botox and restalyne injections. The nurse practitioner's name was included in the salon's advertisement. A search by the BBC for a physician attached to the Salon did not yield an affiliation.
- **The complaint notification from the Board of Nursing (BON)** focused on the **allegation** that the nurse practitioner aided and abetted the unauthorized practice of medicine by participating in and cooperating with the Salon in advertising and procuring clients to whom she prescribed, administered or furnished Botox and Restylane, dangerous drugs, without an order from a licensed physician.

Do You Think The BON Took Action?

- Do you believe the Board of Nursing took action against the nurse practitioner?
- How much do you think it took to defend the NP against the Board?
- How long do you think it took the investigation to resolve?

Risk Control Recommendations

- Be cautious to allow a third party to use your name in advertising as the advertisement can be misleading as to credentials, affiliation and/or services.
- Consider consultation with an attorney familiar with regulations governing practitioner license before entering into a business arrangement with any third party. Your license is your livelihood and the cautionary step could minimize a practitioner's risk of a complaint being filed against them.

BON Decision

- **The BON** Findings included confirmation the nurse practitioner had a collaborating agreement with a physician which refuted the fundamental allegation of the complaint that the nurse practitioner was practicing medicine without a license where in fact there was a collaborating physician prescribing the dermafillers dispensed by the nurse practitioner.

- Based on the BON findings, the complaint was closed with no action taken by the Board. The cost to defend the nurse practitioner before the board was over $18,000 for a complaint that lasted four (4) years from reported incident to board decision.

Any Questions??

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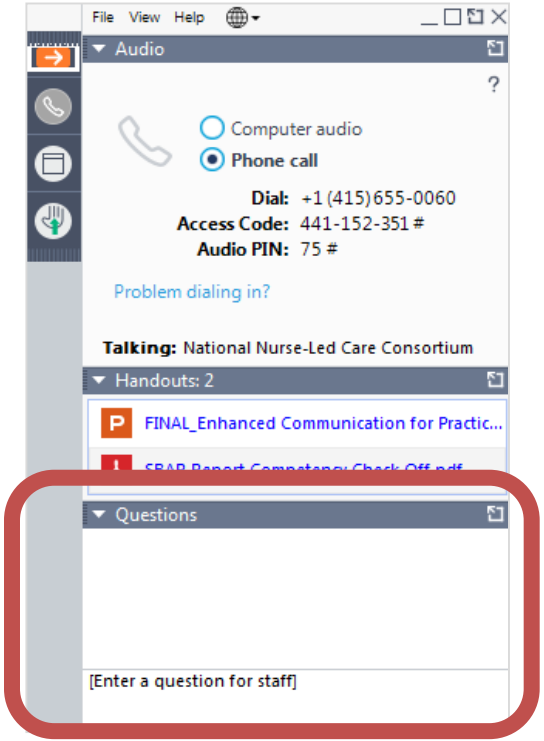

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Other QPP or NP SAN Questions?

For more information on the **QPP** or the **Nurse Practitioner Support and Alignment Network (NP SAN)**:

- Email **Joseph Reyes** at **jreyes@aanp.org**
- Email **Cheryl Fattibene** at **cfattibene@nncc.us**
- Visit us **online at https://www.aanp.org/practice/np-san**
- **Stay up to date** on the latest CE opportunities: **http://bit.ly/NPSAN_subscribe**

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Coming Up

Nurse Practitioner Home-based Primary Care

June 26, 2019

Tracey DeCastro, MSN, FNP-BC

Register Here

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