KEY AREAS OF RISK FOR OCCUPATIONAL THERAPY PRACTITIONERS

Reducing Risks and Enhancing Patient Safety

Abstract

This white paper identifies key and emerging areas of risk and risk reduction strategies for occupational therapy practitioners

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INTRODUCTION

The future is bright for occupational therapy (OT) practitioners—demand for rehabilitative services and employment numbers in the profession continue to grow.[1] The *U.S. News and World Report* ranked OT as the 13th best job of 2019.[2] The Bureau of Labor Statistics projects 24% employment growth for occupational therapists between 2016 and 2026—a growth metric that is much higher than the average. Jerilyn Callen, OTD, OTRL, an Austin-area occupational therapist and educator, agrees, saying, "The profession encompasses a very diverse scope of practice settings and types of patients, allowing OT professionals an array of opportunities and business models in which to pursue their professional interests."

According to data obtained from the American Occupational Therapy Association (AOTA) website, two-thirds of occupational therapists surveyed work in three settings—hospitals, schools, and long-term-care or skilled nursing facilities.[3] Over the past five years, the number of OT businesses has grown by 3.8%.[4] According to Callen, market favorability and desire for greater autonomy has led many occupational therapists to move away from traditional employment models into independent contractual arrangements and business ownerships. These nontraditional employment models for healthcare professionals bring greater autonomy and opportunity but are accompanied by new risks. Although clinical risks remain at the forefront, financial, business, and regulatory risks are also important issues to understand and prepare for. Against this backdrop of great opportunity, OT practitioners need the requisite understanding of potential risks associated with their practice setting and employment model and determine the best ways to manage them. A comprehensive understanding of risks is important in any healthcare profession, but even more so when professional risks accompany business risks.

CLINICAL RISKS

For healthcare professionals, clinical risk management is grounded in their duty to "do no harm." Despite the best intentions, much work remains to make healthcare safer. Far too many people are harmed by medical errors. Since 1999 with the Institute of Medicine's report, "To Err Is Human: Building a Safer Health System," heightened awareness has emerged regarding the frequency and severity of medical errors in the U.S. The report described the nation as "experiencing an epidemic of medical errors."[5] The Institute of Medicine revisited the issue in a 2001 report, "Crossing the Quality Chasm: A New Health System for the 21st Century," and reinforced the alarm, stating, "The nation's health care delivery system has fallen far short in its ability to translate knowledge into practice and to apply new technology safely and appropriately."[6]

It is hard to know the exact number of medical errors in the United States, but a study performed at Johns Hopkins University claimed that more than 250,000 people die from medical errors each year, making it the third leading cause of death.[7] For comparison, 629 deaths from airplane crashes occurred in the United States in 2016 [8] Many patients survive medical errors but are harmed as a result. Miscommunication, flawed systems, lack of training and resources, and inadequate policies and procedures have all been cited as key drivers of medical errors. Healthcare professionals have personal accountability for managing clinical risk and preventing harm.

Against the backdrop of the alarming number of medical errors, no healthcare professional is immune from professional liability. OT professionals, as part of the healthcare team, share the responsibility of managing known risks and identifying areas prone to errors in the practice setting. Fortunately, OT practitioners are not frequent targets of professional liability actions. Nonetheless, it is important to understand the areas of practice that pose the highest risks and implement strategies to reduce exposure.

According to data from the National Practitioner Data Bank (NPDB),[1] 101 malpractice payments were made and 1,254 adverse action reports filed against OT practitioners between 1986 and 2012.[9] Of the 101 malpractice payments, the highest payment reported was $595,000, and the average payment was $38,364.[10] The most common allegation was improper treatment and failure to monitor.[11] Occupational therapists involved in direct client intervention who use physical agent modalities or therapeutic equipment, treat clients with complex conditions and preexisting injuries, or provide functional mobility training have a higher chance of being sued for malpractice.

Some of the most common injuries are fractures, burns, and injuries from improper use of physical agent modalities.

Falls with Injuries

Falls during therapy and injuries in a whirlpool or on equipment are common allegations in claims/lawsuits against OT practitioners. Falls remain the leading cause of injury and death among older adults, with an estimated total medical cost for fatal and nonfatal fall injuries of $30.9 billion.[12] In 2015, 24,190 fatal falls occurred.[13] The Agency for Healthcare Research and Quality has estimated that 700,000 to one million hospitalized patients fall each year.[14] Patients in long-term care facilities are also at a very high risk of falls. Approximately half of the 1.6 million nursing home residents in the United States fall each year, and a 2014 report by the Office of the Inspector General found that nearly 10% of Medicare skilled nursing facility residents experienced a fall resulting in significant injury.[15] Research has shown that close to one-third of falls can be prevented.[16] Fall prevention involves managing a patient's underlying fall risk factors and optimizing the physical design and environment.

[1] The National Practitioner Data Bank (NPDB) is a web-based repository of reports containing information on medical malpractice payments and certain adverse actions related to healthcare practitioners, providers, and suppliers.

According to the Joint Commission, the most common contributing factors relating to falls include the following:

- Inadequate assessment
- Communication failures
- Lack of adherence to protocols and safety practices
- Inadequate staff orientation, supervision, staffing levels, or skill mix
- Deficiencies in the physical environment
- Lack of leadership[17]

Within a facility setting, the question of whether a fall constitutes medical malpractice rather than ordinary negligence can often be difficult to determine. For the fall to be considered for a medical malpractice action, it must meet the burden of proof for medical negligence. Healthcare professionals may be liable under a malpractice theory if they fail to address underlying conditions such as poly-pharmacy, misdiagnosis of a condition that caused a fall (such as a stroke), or failure to assess a patient for high risk of falling.

A slip, trip, or fall in a healthcare setting resulting from an environmental hazard may result in a premises or ordinary liability claim. OT practitioners should be aware of and implement evidence-based fall prevention strategies that include environmental assessments and individualized patient/client assessments. This is perhaps one of the highest clinical risks for OT practitioners. Whether due to medical malpractice or ordinary liability, falls in the healthcare setting contribute to a significant portion of overall losses.

Physical Agent Modalities

Another area of clinical risk for occupational therapists is injuries and reinjuries while using physical agent modalities (PAMs). The use of PAMs by OT professionals was once controversial. However, in 2008, the American Occupational Therapy Association (AOTA) clarified scope of practice questions by asserting that “physical agent modalities (PAMs) can be used by occupational therapists and occupational therapy assistants in preparation for, or concurrently

with, purposeful and occupation-based activities or interventions that ultimately enhance engagement in occupation."[18] AOTA further stipulated that PAMs may be applied only by occupational therapists and occupational therapy assistants (OTAs) who have "documented evidence of possessing the theoretical background and technical skills for safe and competent integration of the modality into an occupational therapy intervention plan" (AOTA, 2008).[19] These agents include, among others, the following:

- Superficial thermal agents
- Deep thermal agents
- Electrotherapeutic agents
- Mechanical devices

The proper performance and supervision of PAMs is a significant area of risk for OT practitioners. Common allegations include the following:

- Burns from modality. These injuries can indicate that the therapist may have either incorrectly applied the modality or improperly supervised the client during application of the modality.
- Improper treatment claims or reoccurrence of a preexisting condition. This allegation can suggest that the therapist did not adhere to the standard of care for that particular client or diagnosis.
- Injuries caused by equipment malfunction. Such injuries may indicate that the therapeutic equipment may not have been properly maintained.[20]

PAMs should be employed only when service competency and professional judgment in selection, modification, and integration have been demonstrated and documented.[21] Evidence-based evaluation, intervention techniques, and therapeutic equipment should be employed when using PAMs. All equipment used should be subjected to preventative and ongoing maintenance and checks in accordance with the manufacturer's recommendations. If one's duties are assumed by another OT practitioner, it is important that their credentials, qualifications, experience, and scope of practice match one's own. Some states have statutory or

regulatory requirements for the use of PAMs. Finally, it is important to provide adequate supervision and support to any OT practitioner for whom a supervisor has oversight responsibility because of the risk of liability for supervisory actions. It is also important to be aware of any state regulations related to the oOTA's scope of practice and supervision requirements. The AOTA's official document titled "Guidelines for Supervision, Roles, and Responsibilities during the Delivery of Occupational Therapy Services" provides guidance on the appropriate delegation of evaluation and intervention.

THE U.S. MALPRACTICE CLIMATE

The frequency of medical liability claims in the United States declined from 2007 to 2017.[22] Almost 87% of the paid claims reported to the NPDB were made on behalf of a physician or dentist, with the remaining 13% on behalf of other healthcare professionals.[23] The reduction in medical liability claims has been influenced by effective tort reform. Nonetheless, litigation remains costly, with the average indemnity for all healthcare specialties standing at $335,578.[24] Although the number of malpractice payments made on behalf of occupational therapists is increasing, the frequency and severity of malpractice claims remain relatively low in comparison with those of other allied health professionals.[25] For closed claims in all healthcare specialties, improper performance, errors in diagnosis, failure to supervise or monitor case, medication error, or failure to recognize a complication are listed among the top factors.

ELEMENTS OF PROOF IN A MEDICAL LIABILITY ACTION

Two sets of laws govern our behavior: criminal and civil. Civil law deals with disputes between individuals or organizations in which compensation is awarded to the victim. Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses. Professional liability cases are civil matters. To prove negligence against a healthcare professional, the plaintiff must show that the healthcare professional was negligent in rendering care and that the

negligence was the proximate cause of the injury. Negligence is defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do."[26] The severity of an injury can range from an emotional injury to death. Four legal elements must be proven: (1) a professional duty was owed to the patient; (2) a breach of that duty occurred; (3) the injury was caused by the breach; and (4) resulting damages occurred. Monetary damages take into account economic loss and noneconomic loss, such as pain and suffering. An allegation of medical negligence must be filed within a time period specified by state law; this period is called the "statute of limitation" and varies from state to state. In recent years, many states have passed tort reform laws that place limits on the amount of money that patients can receive as an award from a healthcare professional. The standard of care is the degree of prudence and caution required of an individual who is under a duty of care. The standard of care is typically provided by testimony from expert witnesses. Standards of practice, guidelines, and consensus statements are often used by experts to establish the standard of care. In determining whether an OT professional acted in accordance with the standard of care, experts may examine some of the following issues:

- Were existing policies and procedures in place at the time of the injury?
- Did the OT practitioner follow the established policy?
- Does the AOTA have practice parameters or policy statements that address the act in question?
- Do any federal or state laws govern the action?
- Does the state licensing board have policies or guidance statements addressing the action?
- Was the OT practitioner properly credentialed to perform the treatment?

Many medical liability claims hinge on whether the healthcare professional followed the established policies in effect at the time of the alleged negligent act. In an article titled "Policies and Procedures as a Basis for Liability," attorney Neil Edwards of Carlock Copeland states:

Well-crafted policies and procedures are an essential part of the operation of modern health-care facilities. They promote practice consistency and are believed to improve clinical outcomes; however, in the event of a bad outcome, policies and procedures become evidence in litigation, and "violations" frequently become the central focus of malpractice claims.[27]

PROFESSIONAL LICENSURE ACTIONS

Malpractice actions are not the only risks for OT practitioners to consider. An increase in the number of adverse actions taken against occupational therapists by licensing boards has occurred. From 1998 to 2014 (last available reporting) 1,355 NPDB adverse action reports were filed.[28] Reportable adverse actions include, among others, those taken by state licensing boards, health plans, governmental agencies, and professional societies. Almost 90% of the adverse actions against an OT involved a state licensure board action.[29] Nineteen exclusion and debarment actions were reported to the NPDB.[30]

The defense against a licensing board complaint can be costly. If the state licensing board investigation is related to acts performed during employment by an organization, typically the organization will assist in the legal defense and bear the associated costs. The organizational insurance policy may exclude any fines and penalties that result from the investigation. If the acts under investigation arise from a self-employment practice, the professional liability policy may cover the legal defense cost.

Some examples of adverse actions include the following:

- Unprofessional conduct (violating the AOTA code of ethics)
- Practicing outside the scope of practice
- Providing substandard care through a deliberate or negligent act or failure to act
- Knowingly delegating responsibilities to an individual who does not have the knowledge, skills, or abilities to perform those responsibilities
- Failing to provide appropriate supervision of an OTA

- Engaging in or soliciting sexual relationships, whether consensual or nonconsensual, while an OT or OTA/patient relationship exists[31]

The ethics commission of the AOTA reviews and investigates ethics complaints filed against AOTA members. Disciplinary actions that may be recommended by the ethics commission include reprimand, censure, probation, suspension, and revocation. The commission maintains an online listing of disciplinary actions taken. It is important to periodically review AOTA's code of ethics and keep abreast of professional standards and practice guidelines to avoid moving into the "line of fire" for a licensure board action or a violation of AOTA's ethics code. According to Callen, many ethical violations occur for failure to keep up with licensure expiration dates.

EMPLOYMENT MODELS AND LIABILITY

The degree of professional liability exposure for OT practitioners is primarily determined by the practice model and type of patients treated. The employment relationship is especially significant because it may determine who is held liable for one's actions in the event of a professional liability action.

Employee

Most OT practitioners employed by a hospital, nursing home, or other healthcare setting are considered agents of the organization (the principal) and are covered by the organization's insurance policy. Hospital professional liability policies typically cover employed medical professionals for their professional acts, errors, or omissions. Employers are vicariously liable under the doctrine of "respondeat superior" for the negligent acts or omissions by their employees in the course of employment. The significance of this phrase is "in the course of employment." For an act to be considered within the course of employment, the employer must have authorized the act, or the act was closely related to an authorized act that an employer should be held responsible for. If the alleged negligent act occurs outside of an employment

setting or constitutes a “rogue” act, the employer may not be liable. For an employee in a non-healthcare setting such as a school, it is important to ensure that the employer maintains insurance coverage for professional liability.

Depending upon the employment circumstances, it may be prudent to maintain a separate policy. Practitioners should know whether they share limits with the organization or if a separate policy is maintained. Callen, who was named in a medical liability claim during her training, advises students to maintain an individual policy. She was not the target of the medical liability action; rather, she was merely present in the operating room observing a procedure, and multiple individuals in attendance were named in the case. According to Callen, “the cost of coverage is still relatively inexpensive and worth the expense when you consider the potential costs associated with litigation.”

Independent Contractor

Independent contractors are technically not employees, and therefore, organizations are not generally held responsible for their negligent acts. When facilities contract with a practitioner to provide services, they may post signs in prominent locations advising the public of the contractual relationship. Failure to post signage may increase the facilities’ risk because it may lead the public to believe that the contracted providers are hospital employees. This may raise issues of “apparent agency” in litigation. As a general rule, healthcare organizations are not liable for the acts of nonemployed medical staff members, independent contractors, or vendors. Each entity is responsible for its own actions or those of its employees or agents who are acting within the scope of their employment or agency. However, courts are sometimes willing to hold a healthcare organization or provider vicariously liable for the acts of nonemployees under the doctrine of “apparent authority.”

As such, independent contractors are typically not covered under the organizational insurance policies. This requires providers to obtain a separate professional liability policy that will cover them for acts that occur while working as independent contractors. Many organizations (in an

attempt to manage their own risk exposure) will require OT professionals to maintain certain limits of liability and provide proof of continuous coverage. This is often addressed in contractual agreements. It is important that providers have a full understanding of all the risks associated with their practice to make an informed decision on the amounts and types of insurance coverage needed. When evaluating an insurance policy, providers should consider some important aspects, such as the following:

- In addition to the coverage for a malpractice action or claim, will the policy respond to a state licensing board matter?
- Does the policy cover only defense costs? Does it cover fines and penalties?
- Will the policy provide reimbursement for lost wages if one is required to attend depositions, hearings, trials, or other legal proceedings?
- Will the policy cover allegations of sexual abuse or misconduct?
- Will the policy cover unintentional damages to property?
- Does the policy cover privacy or security matters (HIPAA violations)?
- Are there any exemptions to coverage?
- Is the practitioner covered for acts related to open-access referrals (if allowed in the state)?

Although this is not an exhaustive list of possible questions, the list provides a framework for some of the most important exposures.

Self-Employed Business Owner

According to a research report by IBISWorld, the private occupational therapy industry in the United States is a $24 billion industry with an annual growth rate of 3.1% and an estimated future growth rate of 1.9% between 2016 and 2021.[32] According to the report, the growing demand for industry services and an increase in financial accessibility for patients resulting from disposable income growth have been key factors.[33]

The report also revealed that about 42,340 businesses operate in this industry with about 160,987 employees. The high growth rate in the industry is attributed to the burgeoning baby boomer population, which requires occupational therapy to manage age-related ailments.[34] Revenue in the industry increased by 14% between 2011 and 2016, employment rates increased by about 19%, and revenue growth rates are expected to continue rising at an average of 3.6% per year through 2021.[35] These growth projections create a favorable environment for occupational therapists who want to start their own businesses or acquire an existing business.

Despite the favorable industry forecasts, business ownership can be daunting. This model calls for a vigorous analysis of risks to advance safety in healthcare, manage uncertainty, and align one's risk appetite with the business strategy. From an insurance perspective, professional liability and business owner's insurance should be considered.

EVALUATING AND REDUCING RISK

The American Society of Healthcare Risk Management (ASHRM) developed a framework for enterprise risk management (ERM) in healthcare. The ERM model "promotes a comprehensive framework for making risk management decisions which maximize value protection and creation by managing risk and uncertainty and their connections to total value."[36] The model identifies eight areas of risk:

- Operational
- Clinical/patient safety
- Strategic
- Financial
- Human capital
- Legal/regulatory
- Technology
- Hazard[37]

OT business owners should comprehensively identify, analyze, prioritize, treat, and monitor the risks within each domain and determine the best risk treatments. Certainly all risks cannot be avoided, but a comprehensive risk management plan can help owners to determine the risks to avoid and those to reduce and to make a determination on the amount of risk to transfer through purchase of an insurance policy. Owners can thus transfer all or part of the risk to a third party.

Some of the risks that are commonly transferred through an insurance policy include the following:

- Professional liability
- Employment practices liability
- Directors and officers
- General or premises liability
- Business interruption
- Cyber liability
- Workers' compensation
- Errors and omissions

A business plan provides the operational and financial objectives of a business and contains detailed plans and budgets showing how the objectives are to be realized. An important component of a business plan is the identification of any risks, threats, and challenges. See the article titled "Starting a Private Occupational Therapy Practice Business—A Complete Guide."

TOP FIVE RISKS—RISK-REDUCTION STRATEGIES

I. CLINICAL

A. Adhere to the Scope of Practice

The scope of practice describes the actions that healthcare practitioners are allowed to undertake based on their professional licensure. A scope is typically statutorily defined by a state

practice act, regulations set forth by a professional licensing board, or state and federal organizations such as those set forth by the Centers for Medicare and Medicaid Services. Practicing outside of the legal scope of practice is a violation of practice acts and may place you at risk for an adverse action from the professional licensure board. As the scope of practice for OT practitioners continues to evolve, it is important to understand and practice within the boundaries of the scope of practice. The AOTA provides some scope of practice guidance on issues such as the use of cold laser, treatment of spine and lower extremity injuries, and gait assessment for fall risk.

B. Maintain Accurate, Complete, and Timely Documentation

Documentation is likely one of the most widely discussed topics in healthcare risk management, for good reason. It serves many important functions. Although many view documentation merely from the perspective of defensibility, its primary purpose is to facilitate communication among the healthcare team members. Documentation is not just something done after patient care is provided—documentation itself *is* patient care. From a professional liability standpoint, the medical record is a legal document that serves as evidence that the standard of care was upheld. Regulatory agencies use the medical record to determine compliance with quality-of-care standards. Finally, proper documentation is necessary for accurate and timely payment for furnished services.

Documentation: The Cornerstone of Patient Safety

A 2015 report by CRICO, a division of the Risk Management Foundation of Harvard Medical Institutions Inc., found that "communication failures were linked to 1,744 deaths in five years and communication was a factor in 30% of 23,658 cases filed from 2009-2013."[38] Documentation is directly linked to communication. The healthcare system is complex, and patients often transition through many care settings. Although verbal communication is the richest form of communication, we simply cannot rely on the ability to speak to every healthcare provider involved in patient care. The documentation in the medical record is the central

"storehouse" for information. When we consider that the written word may be our only communication with other members of the healthcare team, its importance takes on new meaning. This perspective helps us regard documentation as an integral aspect of patient care rather than an extra step. Consider how documentation played a role in a medical error involving a college student in New York City named Libby Zion.

Zion was admitted to a Manhattan emergency room (ER) with a high fever and agitation. After consulting with her family physician, the residents who evaluated Zion in the ER administered a sedative and painkiller. What none of the caregivers knew was that she was taking an antidepressant that was dangerously contraindicated with the drugs the physicians gave her in the ER. The drug combination ultimately proved fatal; Zion died from cardiac arrest.[39]

Common errors that can result in medical errors include the following:

- Failure to document allergies and drug reactions
- Failure to document medications
- Failure to document interventions
- Improperly transcribing orders

Medical Liability—Your Best Defense or Your Worst Enemy

The medical record is viewed as "the witness that never dies and never lies." Often the first analysis of medical negligence begins with a review of the medical record. The record is a legal document that provides the most valuable evidence as to what transpired between the patient and the healthcare provider. The medical record can be entered into evidence as proof that what it says is true. It is in healthcare professionals' best interest for the medical record to chronicle care in his/her own words. In the absence of documentation, the plaintiff's lawyer may attempt to create an alternative theory as to the care and treatment provided.

Common documentation vulnerabilities include the following:

- Omissions
- Contradictions and inconsistencies
- Time delays and unexpected time gaps
- Alterations or falsification
- Negative comments about other healthcare professionals
- Care inconsistent with policies
- Long narratives with extraneous facts
- Incomplete forms
- Uncaring attitude or lack of empathy
- Incomplete assessments and reassessments

Failure to communicate promptly and appropriately for the situation and failure to document medical care continue to be the two factors most commonly associated with defensibility in medical profession liability claims. The record will be examined for completeness, accuracy, omissions, alterations, and specifics related to the treatment.

In a negligence lawsuit, the plaintiff must prove, by a preponderance of evidence, that the healthcare professional was negligent in rendering care and that the negligence was the proximate cause of the injury. Negligence is defined as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do."[40] The medical record is a significant part of the evidence.

Litigation of medical liability cases often occurs years after the care was provided. Although the memory of the pertinent events may fade, the events documented in the medical record are heavily relied upon as factual—this is why the medical record is often referred to as "the witness that never dies and never lies."

Falsification of a medical record is a serious offense that can carry civil and criminal penalties. When an alteration of a medical record is discovered, a plaintiff's attorney will almost certainly attempt to show that the alteration was intended to falsify the record in an effort to defend substandard care. As a result, the healthcare professional's credibility will be seriously compromised. Many juries heavily rely on the credibility of the healthcare professional.

Fraud is "the intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person." Misstatements or omissions are not necessarily fraud. In fact, they are usually errors. Errors are not deliberate; fraud is. Fraud requires the intent to mislead.

A former nurse with the Department of Veterans Affairs pleaded guilty in 2015 to altering, falsifying, and destroying records and committing computer fraud. The nurse falsified the electronic medical records of a 76-year-old veteran who was under the care of Enrique Martinez at a Veterans Administration (VA) facility in Florida. Martinez allegedly provided poor care to the veteran, so he falsified records and destroyed the computer system to cover his tracks.[41]

Intentionally falsifying medical records also constitutes spoliation of evidence. Spoliation is the destruction or significant alteration of evidence through failure to preserve it properly for another's use as evidence in pending or reasonably foreseeable litigation. As demonstrated in the Martinez case, falsification of a medical record can lead to criminal penalties.

Regulatory Compliance: Not Documented—Not Done

Many regulatory agencies rely heavily on documentation to determine compliance with standards. Typically, a targeted sampling of medical records is reviewed to determine compliance. Investigations by a professional licensing board will also likely involve a review of the medical record to determine whether the care meets the requirements set forth in the applicable practice act.

Documentation and Reimbursement

In recent years, the U.S. Department of Health and Human Services Office of the Inspector General (OIG) has stepped up enforcement activities surrounding clinical documentation and fraud. The most commonly perpetrated examples of healthcare documentation fraud include the following:

- Billing for services not rendered
- Billing for a noncovered service as a covered service
- Misrepresenting dates of service
- Misrepresenting locations of service
- Misrepresenting provider of service
- Waiving of deductibles and/or copayments
- Incorrect reporting of diagnoses or procedures (including unbundling)
- Overutilization of services[42]

The AOTA's (2015) Code of Ethics reinforces in Principles 4 and 5 that OT practitioners have an ethical and legal duty to be vigilant in knowing and following the standards and regulations related to clinical documentation to accurately report "treatment time" and bill for their services. The AOTA offers online resources to assist providers with documentation and billing issues.

Ten Documentation Tips for Occupational Therapy Practitioners

1. Ensure that documentation is accurate, complete, and timely because it will show that the standard of care was met.
2. Document safety precautions (pay particular attention to safety with physical agent modalities).
3. Notify and document any significant changes in condition that are escalated to the provider.
4. Document in accordance with organizational policies and procedures (pay particular attention to requirements for assessments and reassessments).

5. Amendments to the medical record should be made in accordance with organizational policies.
6. Refrain from making any alterations to a medical record if you are notified of an impending professional liability action against you.
7. Avoid inappropriate subjective opinions, conclusions, or derogatory remarks about patients, their family members, and colleagues.
8. Documentation should be congruent with the treatment plan and justify the services billed. (Services must relate directly to the written treatment plan.)
9. Document declinations of care.
10. Document adverse events with transparency, but refrain from placing an incident report in the medical record.

C. Use Evidence-Based Practice Guidelines

Evidence-based guidelines are guiding statements and treatment algorithms based on scientific evidence. In a professional liability claim, experts will likely rely on the evidence-based guidelines that were in effect at the time of the alleged incident. By using current evaluation and treatment methods and knowing the AOTA and state guidelines for particular therapeutic interventions, a therapist can prove that he or she adhered to such a standard. Despite disclaimers that these are guidance documents, expert witnesses in professional liability claims will often point to practice guidelines to establish the standard of care. When the patient's circumstances or condition warrants a deviation from evidence-based guidelines, it is important to document the rationale to support the clinical decision-making. The AOTA maintains an Evidence-Based Practice Resource Directory that links users to internet sites related to the evidence-based practice of occupational therapy. The Resource Directory is organized to connect occupational therapists, occupational therapy assistants, and students with useful web-based resources.

D. Safely Use Physical Agent Modalities

When performing physical agent modalities, adhere to the following principles set forth by the AOTA:

Principle 1E: provide occupational therapy services that are within each practitioner's level of competence and scope of practice (e.g., qualifications, experience, and the law).

Principle 1F: use, to the extent possible, evaluation, planning, intervention techniques and therapeutic equipment that are evidence-based and within the recognized scope of occupational therapy practice.

Principle 1G: take responsible steps (e.g., continuing education, research, supervision, and training) and use careful judgment to ensure competence and weigh the potential for client harm when generally recognized standards do not exist in emerging technology or areas of practice.

Principle 5: take responsibility for maintaining high standards and continuing competence in practice, education, and research by participating in professional development and educational activities to improve and update knowledge and skills.

Principle 5G: ensure that all duties assumed by or assigned to other occupational therapy personnel match credentials, qualifications, experience, and scope of practice.

Principle 5H: provide appropriate supervision to individuals for whom they have supervisory responsibility in accordance with AOTA official documents and local, state, and federal or national laws, rules, regulations, policies, procedures, standards, and guidelines (AOTA, 2010).[43]

E. Provide a Safe Environment of Care with Special Attention to Fall Prevention

Falls are a significant risk for OT practitioners. Whether the practice setting is a rehabilitation office, school, home, or hospital, the environment of care should be regularly evaluated for safety. It is important to implement a formalized plan to evaluate for safety hazards because they often go unrecognized in a familiar environment. When working in a setting that may involve mental health patients, additional special considerations are needed. Additionally, OT practitioners are involved in the identification of patients at high risk for falls and employing

strategies for prevention and patient safety. Evidence-based assessment tools and interventions should be employed.

II. PROFESSIONAL

A. Maintain Appropriate Patient-Therapist Relationship Boundaries

The 2015 "Occupational Therapy Code of Ethics" of (AOTA) addresses standards of conduct, stating that occupational therapists should "maintain clear professional boundaries or objectivity."[44] It is important to recognize that interactions of a sexual nature with a client are not only a violation of the AOTA's code of ethics but can also serve as the basis of a lawsuit. Therapists must be aware of these risks and understand that this type of conduct most likely will not be covered by malpractice insurance because the actions did not occur in the course of employment or within the duties or scope of employment or practice.

III. COMPLIANCE

A. Billing and Reimbursement

It is important to maintain an effective compliance program to ensure billing and coding integrity. Improper billing procedures and other practices that are inconsistent with providing medically necessary services can place OT practitioners at risk for criminal and civil liability. AOTA offers online resources to assist providers with documentation and billing issues.

The OIG has developed a series of voluntary-compliance program guidance documents directed at various segments of the healthcare industry, such as hospitals, nursing homes, third-party billers, and durable medical equipment suppliers, to encourage the development and use of internal controls to monitor adherence to applicable statutes, regulations, and program requirements. See "Compliance Guidance."

IV. BUSINESS

A. Evaluate Risk/Insurance Needs Based on the Employment Model

Practice models should be customized based on the employment model. Providers should consult an insurance professional as they contemplate the types and amount of insurance coverage they need.

V. LEGAL

A. Have Your Contracts Reviewed by an Attorney

For an independent contractor, it is important to execute a contract to ensure that expectations from both parties are clearly delineated. It protects both parties if expectations are not met and provides a roadmap for issues that may arise in the relationship. In addition to financial arrangements, providers should consider any noncompete provisions that may limit their ability to practice within a specified geographic distance or with certain competitors. It is always best to have contracts reviewed by an attorney to ensure that one's interests are protected.

CONCLUSION

As the practice of occupational therapy continues to evolve and the scope of practice expands, OT practitioners may engage in acts that will create greater exposure to professional liability. Certain practice settings and patient populations create a higher number of risks. Providers should consider these factors in determining how much risk they are willing to assume or transfer through an insurance product. Regardless of the practice setting, it is important to remain vigilant about the potential legal pitfalls and make patient safety a priority.

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