

## Student Training Programs May Pose Significant Liability Exposures to Anesthesiologists



Preferred Physician Medical (PPM) policyholders frequently receive requests to participate in student training programs for emergency medical technicians (EMTs)<sup>1</sup>, student nurse anesthetists (SRNAs), medical residents or students, and respiratory therapists to provide training and supervision for intubation proficiency and airway maintenance. While PPM does not discourage our policyholders from participating in these student training programs, the following case summary underscores the significant liability exposures that can arise.

- 20 year-old female, 5'4", 38.5 kg, with a medical history significant for kidney removal, duodenal obstruction and persistent vomiting for 4 days presented for Roux-en-Y gastric bypass and appendectomy. A nasogastric (NG) tube had been placed on the day of the procedure, but the NG tube had been “sneezed out” approximately 2 hours prior to the procedure. The surgeon was aware the NG had come out; however, that information was never conveyed to anesthesia.

The PPM insured anesthesia group had a contract with the county emergency medical services (EMS) program for teaching EMT students intubation. An EMT student being supervised by a PPM insured anesthesiologist and a certified registered nurse anesthetist (CRNA) attempted a standard intubation. The EMT student intubated the patient’s esophagus on his first attempt. The esophageal intubation was immediately recognized and the CRNA successfully intubated on the second attempt. The patient aspirated a “significant amount” of gastric contents that was suctioned. An NG tube was placed and approximately 600 cc of gastric contents were suctioned from the patient’s stomach.

The surgery was completed without further complication. However, a chest x-ray showed an aspiration pneumonia, which required, prolonged intubation and ventilation. On the seventh post-operative day, the patient had a period of ventricular tachycardia and was thought to be experiencing an acute myocardial infarction. The patient was transferred to another facility where she underwent urgent cardiac catheterization. The patient had a complicated medical course after the aspiration requiring various hospital admissions for pneumonia, aspiration, strokes and complications from tracheostomy. The patient was subsequently diagnosed with significant brain damage and was unable to perform activities of daily living.

The patient’s parents, on behalf of their daughter, sued the hospital, the PPM insured supervising anesthesiologist and anesthesia practice group.<sup>2</sup> Plaintiffs’ allegations included, but were not limited to, failing to employ adequate diagnostic procedures and tests to determine the nature and severity of the plaintiff’s medical status and/or conditions; failing to employ appropriate treatments and procedures to correct such conditions; negligently permitting, without notice to and/or the consent of the plaintiff, an

<sup>1</sup> The term “Emergency Medical Technician” (EMT) encompasses several different levels of training, responsibility, experience and skill. EMT-Basic is an entry level certification including basic airway management. EMT-Intermediate is a step between Basic and Paramedic and includes additional education and skills instruction. EMT-Paramedic requires either a two year degree or a certification program and is the most advance level of EMT. Paramedic skills include, among others, advanced airway management including endotracheal intubation, forcep use for airway obstruction and emergency surgical airway skills.

<sup>2</sup> Plaintiffs did not sue the EMT student despite the fact the county employer carried \$1,000,000 in insurance coverage for claims against its EMT students.

EMT student to attempt intubation; negligently failing to inform the plaintiff of the risks reasonably associated with permitting an EMT student to attempt intubation; and failing to exercise reasonable care in the treatment and management for the complications and sequelae associated with aspiration of gastric contents causing permanent and irreversible brain damage and related injuries.

Plaintiffs' anesthesiology expert, Corey Burchman, MD from York, Pennsylvania, was prepared to testify that the supervising anesthesiologist violated the standard of care by allowing an EMT student to attempt intubation on a patient with a significant risk of aspiration due to her bowel obstruction. Plaintiff's expert also criticized the failure to perform a rapid sequence induction. Dr. Burchman was also critical of the intervention and response to the observed aspiration.

The defense anesthesiology expert opined there was no deviation from the standard of care by performing an esophageal intubation that was recognized immediately with the tube removed and reintubated. The defense expert also expressed that aspiration is one of the recognized risks associated with intubation and not a breach of the standard of care. The defense expert was prepared to testify it was not below the standard of care to allow an EMT student to perform the intubation under supervision. However, the defense expert conceded he would not have allowed an EMT to attempt intubation on this patient due to her increased risk for aspiration.

The plaintiffs' economic expert estimated the plaintiffs' lost earnings at present value were \$1,606,554. Plaintiffs' economic expert estimated future care costs for in-home care at \$16,155,770 to \$21,969,117 and in a care facility at \$29,945,398 to \$30,246,075.

With the consent of PPM's insured anesthesiologist and anesthesia practice group, PPM participated in a court-ordered, pre-trial settlement conference with the hospital and plaintiffs. On behalf of the PPM insureds, PPM contributed to a \$7,000,000 global settlement with the hospital. ❖

## Risk Management Tips

- Carefully select appropriate patients to be intubated by students (for example, patients with no significant co-morbidities, easy airways and class 1 or 2 on Mallampati classification, edentulous)
- Verbal and written anesthesia informed consent must specifically disclose that students may be involved in the patient's care (PPM's Claims and Risk Management Departments can provide sample anesthesia informed consents)
- Patients must have the opportunity to refuse to allow students to participate in their care
- Ensure students have been carefully screened and have appropriate level of education, training, experience and skills to participate in a training program

## Liability Exposure from Contractual Provisions in Training Agreements

In addition to allegations of medical negligence arising from supervising students in training programs, PPM policyholders should recognize that indemnification and hold harmless language found in most student training agreements may give rise to additional claims, lawsuits and costs. Moreover, such contractual provisions may create additional exposure for PPM policyholders that may not be covered by their PPM professional liability policy.

At the very least, such contractual provisions create a theoretical exposure that may not be covered by most medical malpractice insurance policies. Almost every medical malpractice insurance policy, including PPM's,

includes some exclusion for liabilities assumed under contract. Many insurance policies have a blanket exclusion for all such contractual obligations. More progressive medical malpractice insurance companies, including PPM, have modified this exclusionary language to better reflect the fact that such contracts are now common in the practice of medicine. PPM's policy excludes liabilities except to the extent such claims would have been covered regardless of the contract.<sup>3</sup> PPM's approach to this issue is designed to extend insurance coverage to those areas that fall within the traditional framework of professional liability coverage, including supervising students in training programs. This approach also recognizes the need to prevent contractual overreaching that may attempt to inappropriately shift significant liability exposure to a PPM policyholder.

Given the potential exposure created by these contractual provisions, PPM policyholders should carefully review any indemnification and hold harmless language contained in student training agreements. Any indemnification and hold harmless provisions should be mutual in nature and limit the amount recoverable by each party. The following is an example of contractual language that attempts to shift responsibility and additional loss exposure from a hospital to the anesthesia group:

Anesthesia Group shall indemnify and hold harmless the Hospital from any and all claims, demands, damages, lawsuits, liabilities, costs and expenses, including attorney's fees, for injuries to persons arising in whole or in part out of any negligent or intentional act or omission of the Anesthesia Group or Student.

Not only does this language broadly shift exposure to the anesthesia group, but it also lacks mutuality and fails to limit the amount recoverable from the Anesthesia Group. PPM policyholders should resist the inclusion of such overreaching contractual language and negotiate more favorable language that defines the responsibilities of each party rather than language that shifts responsibility and loss to the PPM policyholder. The following is an example of language that avoids the shifting of responsibility and loss while also defining the relationship:

Anesthesia Group shall indemnify and hold harmless the Hospital from any claims, demands, damages, lawsuits, liabilities, costs and expenses, including attorney's fees, for injuries to persons arising out of any negligent or intentional act or omission of the Anesthesia Group. However, this indemnification shall not extend to the claims, demands, damages, etc. to the extent proximately caused by the Hospital, Students, or their agents and employees. Anesthesia Group shall have no obligation to indemnify the Hospital beyond the medical malpractice insurance coverage that Anesthesia Group is required to maintain as set forth in this Agreement. Hospital shall indemnify and hold harmless the Anesthesia Group from any claims, demands, damages, etc. for injuries to persons arising out of any negligent or intentional act or omission of the Hospital, Students, or their agents or employees.

This contractual language is narrowly tailored, mutual in nature and caps the Anesthesia Group's contractual exposure within the Anesthesia Group's medical malpractice insurance coverage. When considering whether to enter into student training program agreements or contracts, PPM encourages our policyholders to obtain the advice of personal or corporate counsel who can advise you more specifically on the entire contract, as well as address any additional issues of local concern. ❖

### Contract Review Tips

- Carefully review any student training agreements or contracts (PPM's claims attorneys are available to assist with contract review)
- Determine if students have malpractice insurance coverage through the hospital, employer or school
- Obtain copies of certificates of insurance confirming student malpractice insurance coverage

<sup>3</sup> See, Part 4(i) of the PPM Physicians Professional Liability Insurance Policy.

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# ANESTHESIA the LAW

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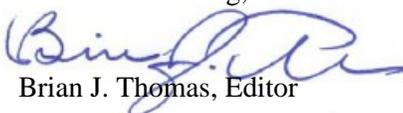
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## In This Issue

We highlight the significant liability exposures that PPM policyholders may face when participating in student training programs. These exposures may arise from allegations of medical negligence and/or the contractual provisions contained in student training agreements. We also provide some risk management tips to mitigate the risks and potential liability exposures involved in participation in these student training programs.



Thanks for reading,

  
Brian J. Thomas, Editor

**Note:** The purpose of this newsletter is to provide information to policyholders and defense counsel regarding professional liability issues. Risk management analysis is offered for general guidance and is not intended to establish a standard of care or to provide legal advice.

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