

# Two Developments in Claims Against APNs

## Applicability of the Affidavit of Merit Statute and potential extinction of joint protocols

By Matt Rydzewski, Esquire  
*The New Jersey Law Journal*  
May 14, 2015

Advanced practice nurses (APNs), otherwise known as nurse practitioners, play an increasingly important role in providing health care to New Jersey residents. This is especially so in our medically underserved areas and populations (MUA/Ps) where there is a shortage of available primary care physicians. According to the U.S. Department of Health and Human Services, Health Resources and Services Administration, 19 out of the 21 counties in New Jersey have designated MUA/P areas. Those areas most in need include Burlington, Cumberland, and parts of Essex and Middlesex counties. This shortage is expected to continue to grow in light of the increasing number of insureds under the Affordable Care Act.

APNs help to resolve this gap between supply and demand for primary care services by serving as an alternative to seeing a doctor. This is so not only at routine office visits, but in hospitals, urgent care centers and even “express clinics” at pharmacies. The American Association of Nurse Practitioners (AANP) estimates that there are currently over 205,000 licensed nurse practitioners in the U.S., which is up from approximately 140,000 in 2010. APNs are also now becoming more specialized in areas such as oncology, neonatology and pediatrics, women’s health and mental health care.

A natural by-product of the rise in patient care delivered by APNs is an increase in potential medical malpractice claims against them. Yet, in New Jersey, this remains a relatively

undeveloped area of medical malpractice law, at least in terms of published opinions. Given that this is an evolving and growing position in the health-care profession, there are a number of developments that attorneys handling medical malpractice actions must take into consideration. This article seeks to address two of them. The first concerns the applicability of the affidavit of merit requirement set forth in N.J.S.A. 2A:53A-26 et seq. The second is the future of the “joint protocol” requirement and the recent movement for its elimination.

### **The Affidavit of Merit Requirement: How Does It Apply to APNs?**

One of the initial burdens a medical malpractice plaintiff must overcome is to comply with the Affidavit of Merit Statute (N.J.S.A. 2A:53A-26 et seq.). While plaintiffs may view the statute as a boondoggle, defendants view it as an important protection from frivolous claims and from being held to a different standard. As against APNs, the question is not whether, but how, the statute applies.

N.J.S.A. 2A:53A-27 requires the plaintiff to supply an affidavit of merit of an “appropriate licensed person.” When the statute was adopted in 1995, it initially applied to a laundry list of professions that included physicians and registered nurses (RNs). APNs were not on the list. In 2004, the statute was amended by the Medical Care Access and Responsibility and Patients First Act (L. 2004, c. 17). As part of the Patients First Act, N.J.S.A. 2A:53A-27 now incorporates by reference N.J.S.A. 2A:53A-41,

which sets forth additional provisions when the action is one for medical malpractice. N.J.S.A. 2A:53A-41 plainly states that the affidavit requirement applies not only to physicians, but to any “other health-care professional” as well. Undoubtedly, an APN under P.L.1991, c.377 (C.45:11-45 et seq.) is a health-care professional within the meaning of N.J.S.A. 2A:53A-41.

To date, no published opinions in our state courts address and resolve the question of whether an affidavit of merit must be from an APN. Unpublished state and federal opinions are somewhat contradictory. In *Santiago v. Hudson County*, Civ. A. No. 10-3059 (D.N.J. 2011), for instance, the court denied the defendant’s motion to dismiss where the plaintiff supplied an affidavit by an RN against an APN. The court concluded that the affidavit was sufficient, in part because the defendant had not shown how an RN was “substantially different” from an APN. In *Jackson v. Goldsmith*, No. A-3477-11T1 (N.J. App. Div. 2013), the Appellate Division noted that the plaintiff would have had to produce an affidavit of merit against a neonatal nurse practitioner defendant. The *Jackson* court was silent on whether the affidavit needed to be signed by a neonatal nurse practitioner, as opposed to an RN or even a physician.

In the past, it was accepted that an expert from one health profession could opine against a defendant in another based upon the nature of the injury and whether there was sufficient overlap in the professions. In other words, if the facts warranted, an RN or a physician could prepare an affidavit against an APN. This approach was called into question by *Hill Int’l v. Atl. City Bd. of Educ.*, No. A-4139-13T3 (N.J. App. Div. Dec. 30, 2014) (approved for publication). In *HillInt’l*, which dealt with architects and engineers, the court held, “[T]o support claims of malpractice or negligence liability, the AOM must be issued by an affiant who is licensed within the same profession as the defendant. That like-licensed requirement applies even where ... the relevant professional licensure

laws overlap to some degree.” While APNs are subject to R.S. 45:11-45 et seq., RNs and physicians are not. An affidavit by an APN thus should be supplied.

In the absence of a more specific published opinion dealing with the affidavit of merit requirement for APNs, a plaintiff should err on the side of caution and secure an affidavit of an APN. Doing so would avoid the risk of dismissal altogether. From the defense perspective, a demand for an affidavit of an APN should be asserted, even if the plaintiff produces one by an RN or a physician. If such an affidavit is not timely provided, then the defendant should pursue a motion to dismiss as appropriate.

### **The Consumer Access to Health Care Act and Potential Standard of Care Issues**

For years, Section 10 of the Advanced Practice Nurse Certification Act (C. 45:11-49) has required a licensed APN to enter into a “joint protocol” with a “collaborating physician” before the APN can be legally permitted to prescribe medications and certain medical devices to patients. This requirement created difficulties for APNs, especially those seeking to establish a new practice. If the APN could not find a physician willing to be “present or readily available through electronic communications” and to take on the risk of possible liability for the APN’s acts, the APN would be unable to effectively treat patients and build her practice.

On Nov. 29, 2012, the Consumer Access to Health Care Act was introduced in the New Jersey Senate (Bill No. S2354), and in the Assembly (Bill No. A3512) on Dec. 6, 2012. The act seeks to eliminate the joint protocol requirement. It is based upon recommendations of both the National Council of State Boards of Nursing and the Institute of Medicine. At present, the act remains under review by the New Jersey Senate Health, Human Services and Senior Citizens Committee,

as well as the Assembly Health and Senior Services Committee.

Under the Consumer Access to Health Care Act, the joint protocol requirement is deleted and replaced with a “collaborating agreement” requirement that applies only to APNs with less than two years or 2,400 hours of experience. The act also deletes the term “collaborating physician” and replaces it with “collaborating provider,” which is defined as a physician or APN. In exchange, the APN would have to complete additional coursework in pharmacology.

If enacted, the Consumer Access to Health Care Act would significantly advance the role of APNs in our health-care system by eliminating a barrier to entry and allowing greater autonomy. Newly-minted APNs, previously unable to secure collaborating physicians, could now collaborate with established APNs. Established APNs with substantial experience would no longer need to maintain a joint protocol with collaborating physicians. Physicians could then refocus on patient care and spend less time on supervision and reviewing records of others.

That said, the Consumer Access to Health Care Act would greatly alter the standard of care analysis for actions against APNs. With greater autonomy comes greater risk. An APN would no longer be in a position to rely upon a physician to avoid a medical error. For instance, if an APN is alleged to have erroneously prescribed the

wrong medication to a patient, there is no longer a physician who would arguably be in a position to catch and timely remedy the claimed error. On the other hand, physicians would no longer be at risk for potential liability based upon their joint protocols and the actions or inactions of APNs.

While the potential impact of the Consumer Access to Health Care Act on malpractice claims, if enacted, would not be seen for quite a few years, it is a significant development that malpractice attorneys should be mindful of.

### Conclusion

APNs will continue to play an important part in meeting the increasing demand for health-care services in New Jersey. As more patients seek out and receive care from APNs, the potential for malpractice claims against APNs will increase. New Jersey medical malpractice law regarding APNs will continue to undergo a period of significant development, including the applicability of the Affidavit of Merit Statute and the potential extinction of joint protocols.



---

*Rydzewski is an associate in the Cherry Hill office of Marshall Dennehey Warner Coleman & Goggin. A member of the firm's Health Care Department, he focuses his practice on medical malpractice and long-term care liability defense.*