

ClaimsRX

clinical & risk management perspectives

November 2007

Ostensible Agency

When Appearances Lead to Vicarious Liability

CME Information

Sponsored by NORCAL Mutual Insurance Company

NORCAL Mutual Insurance Company is accredited by the Accreditation Council for Continuing Medical Education (ACCME) to provide continuing medical education for physicians.

To obtain CME credit for reading this article, complete and return the attached postage-paid activity Evaluation and CME Attestation Form no later than the expiration date indicated below. To accelerate the processing of your CME certificate and as indicated on the enclosed attestation card, return your evaluation no later than the end of the month following the month of publication. For example, for the November edition of *Claims Rx*, for faster service, complete and return the Evaluation and CME Attestation Form no later than December 31, 2007.

Original release date: November 2007

Expiration date: November 30, 2008

Estimated time to complete this activity: 1 hour

Learning Objectives

To manage vicarious liability risk in the healthcare setting and ensure that physicians are well positioned to help patients understand the relationship between providers by implementing the risk management recommendations herein, providers will:

- Recognize common healthcare provider arrangements that can lead to vicarious liability.

- Refrain from the common use of associations or actions that could be perceived as an agency relationship.

Target Audience

This activity is intended for all healthcare providers.

Credit Designation Statement

NORCAL Mutual Insurance Company designates this educational activity for a maximum of *1 AMA PRA Category 1 Credit™*. Physicians should only claim credit commensurate with the extent of their participation in the activity.

Disclosure Policy

As a provider accredited by the ACCME, it is the policy of NORCAL Mutual Insurance Company to require the disclosure of any financial interest or any other relationship the sponsor, planners or authors and their spouses/life partners have with the manufacturer(s) of any commercial product(s) supporting this activity or discussed as part of a presentation or written monograph. Any identified conflicts of interest will be resolved prior to the commencement of a live activity or the publication of an enduring material.

Disclosures

There are no commercial supporters for this activity. The sponsor, planners and authors have nothing to disclose. This activity does not include a discussion of unapproved drugs or devices.

Introduction

What are Vicarious Liability and Ostensible Agency?

In the most general sense, vicarious liability allows an injured person to hold another person financially responsible for the wrongful acts of the third party that injured him or her. Vicarious liability arises in a

variety of legally recognized relationships, including those between employer and employee, partners in a partnership, and parent and child. In these types of relationships, managing vicarious liability risk is focused on improving the behavior of the person

(continued on page 2)

(*Ostensible Agency*. . . continued from page 1)

who may cause injuries to a third person. For example, an employer would strive to hire competent staff and keep them adequately trained in an effort to diminish the risk that an employee might injure someone.

Ostensible agency is an agency relationship that is implied depending on the actions of the parties involved. In other words, if you appear to be in an agency relationship with another person, a court may determine that you are in one even though you do not have a formal relationship with that person. If the court determines that someone is your ostensible agent, you can be found vicariously liable for the wrongful acts of that person. It does not matter if you do not have a formal relationship. Managing ostensible agency vicarious liability risk in healthcare is directed at ensuring that patients understand the relationship between the people who treat them and hospitals, groups, clinics and offices where they are being treated. This *Claims Rx* will focus on two common healthcare provider arrangements that can lead to vicarious liability based on ostensible agency:

- Physicians who office-share but are not in a legal partnership
- Physicians/healthcare entities who use independent contractors to provide healthcare services to patients

Office-sharing Scenario

Example 1: Two physicians form a legal partnership to treat patients. They share office space and employ front office staff, nurses, and other assistive personnel.

General Law: Due to the legal nature of general partnerships, each partner will be vicariously liable for the negligence of the other partner, so long as he/she is acting in furtherance of the partnership. For example, if a malpractice claim is filed against a patient's treating physician in Example 1, the other physician may be held vicariously liable by virtue of the partnership's existence, even if he or she never treated the injured patient.

Example 2: Two doctors share an office suite. Both of their names are on the door. They share front office staff, a waiting room and various overhead expenses, but have no formal business arrangement.

General Law: If these two physicians have not entered into a partnership agreement, generally, one will not be held responsible for the negligence of the other. However, if a patient reasonably believes that the two physicians are partners, a court may find that the treating physician was the ostensible agent of his/her officemate. If this is the case, then the nonpartner officemate can be found responsible for the treating physician's negligence, as if a general partnership existed.

Employment Scenario

Example 3: A physician employs a physician assistant.

General Law: Employers are vicariously liable for the wrongs committed by employees who are acting within the scope of their employment. In Example 3, the physician would be vicariously liable for the physician assistant's negligent treatment of a patient. Vicarious liability in employment is based on a long standing legal theory referred to as *respondeat superior*, which confers responsibility upon the "master" for the wrongful acts of "servants" or agents who are acting in the "master's" interest.

Example 4: A physician uses an independent contractor physical therapist to provide physical therapy in her office twice a week.

General Law: Employers are not vicariously liable for the negligent acts of independent contractors. However, in Example 4, if a patient could reasonably believe that the physical therapist was an employee of the physician, a court may find that an ostensible agency existed. If that is the case, then the physician may be deemed responsible for the physical therapist's negligence, as if the physical therapist were an employee.

This *Claims Rx* will discuss strategies for reducing vicarious liability risk that arises from office-sharing and using independent contractors.

Vicarious Liability for the Negligence of a Nonpartner Physician in an Office-sharing Environment

Case Study #1¹

Allegation: *A physician sharing office space with another physician was vicariously liable for the negligent injuries to his officemate's patient due to the existence of an ostensible agency.*

The Business Arrangement

Provider #1 was the sole proprietor of "Sun Medical Associates." He leased an office to Provider #2. The "Sun Medical Associates" sign outside the office listed the names of both Provider #1 and Provider #2. The two providers shared telephone and fax numbers. The

letterhead, the patient registration forms, consent forms and referral forms contained both providers' names under the title "Sun Medical Associates." Additionally, patients' health maintenance organizations were frequently billed by Provider #1 for treatment rendered by Provider #2. Provider #2, however, was neither in partnership with nor employed by Provider #1.

The Event

The patient, a sixty-eight-year-old male, presented to Provider #1 at Sun Medical Associates on two occasions seeking treatment for hemorrhoids. Provider #1 determined that the patient had a high PSA level and suspected possible prostate cancer. He referred the patient to Provider #3, a urologist who did not have an office in the Sun Medical Associates suite. Provider #3 performed a prostate biopsy. The biopsy results

Definitions¹

- **Vicarious Liability:** Indirect legal responsibility.
- **Ostensible Agent/Apparent Agent:** A person who reasonably appears to a third person to be the agent of another.
- **Agent:** A person authorized by another to act for him or her.
- **Principal:** One who has permitted or directed another (e.g. an agent) to act for his or her benefit under his or her direction and control.
- **Agency:** A relationship in which one person acts for or represents another by the latter's authority.
- **Employee:** A person in the service of another, where the employer has the power to control and direct the employee in the details of how the work is to be performed.
- **Independent Contractor:** A person who contracts with another to do something for him or her but who is neither controlled by the other nor is subject to the other's right to control the performance of the undertaking.
- **General Partnership:** A partnership in which the parties carry on all business for the joint benefit and profit of all of the partners; one in which all of the partners share the profits and losses, management and liabilities equally.

¹ All definitions derived from Black's Law Dictionary, 5th Edition, West Publishing, 1979.

(continued on page 4)

(Ostensible Agency. . . continued from page 3)

were negative and the plaintiff had no complaints when he followed up with Provider #3 one week later.

One month later, the patient discovered blood in his urine. At his Sun Medical Associates office, Provider #2 treated the patient for the next two months with antibiotics. Shortly thereafter, the patient suffered an ischemic stroke and was diagnosed with bacterial endocarditis. This resulted in congestive heart failure, which necessitated an aortic valve replacement.

The patient brought direct medical liability claims against Provider #2 and Provider #3. He also brought a vicarious liability claim based on ostensible agency against Provider #1 and Sun Medical Associates based on Provider #2's failure to diagnose the endocarditis. The court, citing the letterhead, the names on the door and the billing practices, determined that a reasonable patient could believe that Provider #1 and Provider #2 were engaged in a joint practice of medicine. Therefore, they determined that Provider #1 could be held vicariously liable for the negligence of Provider #2.

Activities that May Indicate an Ostensible Agency

In determining whether or not an ostensible agency exists where physicians are office-sharing, a jury will consider factors that could lead a reasonable person to believe that a joint practice of medicine exists. Activities that may be considered indicative of a joint practice include:

- Sharing office space with a single entrance
- Using a common check-in area and waiting room
- Sharing administrative staff
- Using common letterhead, business cards or billing statements
- Seeing each other's patients on a regular basis
- Sharing overhead expenses
- Sharing professional employees
- Sharing advertisements, brochures or telephone numbers
- Wearing lab coats or nametags that have a common practice name and/or logo

Providers in office-sharing situations should assess the way their medical practice appears to patients. If it appears that a partnership or other joint venture exists, there is a risk of vicarious liability exposure.

Risk Management Recommendations

- Clearly identify separate practices with appropriate signage, both on the entrance door and inside the office space.
- Use separate check-in areas and support staff for each practice.
- Do not use common letterhead or billing statements.
- Do not use common advertisements, websites or share a telephone number.
- Do not share professional employees, such as nurses, medical assistants or technicians.
- Contact NORCAL's Policyholder Services at (877) 443-7232 with any coverage questions or concerns about your practice situation.
- Contact an attorney to address the legal aspects of sharing a practice location and resources. Obtain contract reviews to ensure that you are not assuming additional risk by engaging in the relationship and that the contract does not obligate you to indemnify another party.

Medical Liability Insurance Considerations — Partnerships

The defense of a medical liability claim can become complicated when different providers in the vicarious liability "chain" carry different medical liability insurance limits. For example, in an office-sharing scenario with one physician carrying \$1 million/\$3 million limits of liability and the other carrying \$2 million/\$4 million limits, a patient dissatisfied with the care provided by the physician with lower liability limits could choose to sue the other provider because the other provider represents a "deeper pocket." Additionally, if two or more physicians are each represented by a different medical liability insurer, either insurer's ability to control the direction and quality of a medical liability defense can be compromised because there may be competing—and even conflicting—interests in the case.

While there is no way to eliminate vicarious liability in a situation where a formal partnership exists, there are ways to safeguard against its negative effects, including:

- Ensuring that all physicians in the group carry the same limits of liability.
- Ensuring that all physicians in the group carry medical liability coverage from the same insurer.

Hospital Vicarious Liability for the Negligence of an Independent Contractor Physician

Case Study #2²

Allegation: *The hospital was vicariously liable for the negligence of an independent contractor radiologist because the radiologist was an ostensible agent of the hospital.*

The Event

The patient, a seventy-two-year-old woman, heard something pop in her neck while moving boxes. For the next two weeks she treated her intermittent neck pain and stiffness with Tylenol® (acetaminophen). But one morning, she awoke with severe neck pain and her head was twisted to one side. She was taken to the Emergency Room (ER) by her daughters. The ER physician prescribed Vicodin® (hydrocodone and acetaminophen) for her neck pain and Robaxin® (methocarbamol) to relax her neck muscles. X-rays were taken of her neck. The radiologist's impression was a congenital fusion. Based on the radiology report, the ER physician discharged the patient.

As the patient and her daughters were walking out of the ER, the patient became nauseous. They hurried to the bathroom and she started to vomit into one of the toilets. The last time she vomited, she was unable to lift her head from the toilet bowl and had to be assisted. Unable to walk, she was put in a wheelchair, and then lifted into her daughter's car. The daughters brought their mother home and put her into bed. When she awoke the next morning, she could feel the pain in her neck, but could not move her arms or legs. She was taken by ambulance to another hospital,

where it was determined that her neck was fractured and that she was paralyzed.

The patient filed a medical liability claim against the hospital, the ER physician, the company that contracted to provide emergency medicine physicians for the hospital and employed the ER physician, the radiologist, and the company that contracted to provide radiology services for the hospital and employed the radiologist.

The case went to trial and the jury found that the radiologist was directly liable for failing to diagnose the patient's fractured neck. They also found that his employer was vicariously liable for his negligence. They found that the ER physician and his employer were not liable.

The hospital, which the patient claimed was vicariously liable for the radiologist's negligence because he was an ostensible agent of the hospital, successfully moved for a nonsuit and was dismissed from the case prior to the end of trial. (A nonsuit is a judgment rendered against a plaintiff when he or she is unable to prove a case against a particular defendant.) The hospital based its nonsuit argument on the legal premise that it could not be vicariously liable for the wrongful acts of the radiologist because he was an independent contractor. The nonsuit, however, was overturned on appeal. The appellate court held that a jury could find that an ostensible agency existed between the radiologist and the hospital.

Discussion

The doctrine of *respondeat superior* does not generally apply to a hospital/physician relationship because physicians, due to their level of skill and training, cannot be "controlled" by hospital boards in the same way that employees are "controlled" by employers. Instead, physicians are most often classified as independent contractors. As a result, the hospitals in which physicians provide services generally will not be vicariously liable for the physician's medical

(continued on page 6)

(Ostensible Agency. . . continued from page 5)

negligence.² In this case, however, the appellate court determined that the hospital could be vicariously liable for the radiologist's negligence because all of the elements of an ostensible agency existed.²

Generally, courts will look at two elements when determining whether the elements of the ostensible agency doctrine are satisfied:

1. That the conduct by the hospital would cause a reasonable person to believe that the physician was an agent of the hospital, which is generally presumed unless the hospital notifies the patient that the physician is not an agent, and
2. That the patient relied on the apparent agency when seeking care. In other words, the patient relied on the hospital for treatment, not on a particular physician.²

Consequently, healthcare providers and entities that engage the services of independent contractors will want to ensure that patients are notified and understand that they may receive services from a provider who is not an employee.

Risk Management Recommendations

Healthcare attorney Matthew T. Wall makes the following ostensible agency/vicarious liability risk management recommendations for hospitals. Although developed for hospitals, many of these recommendations can be applied to a group practice or solo practice setting where independent contractors provide patient care.³ Providers are encouraged to take patient health literacy deficits into consideration when creating signage, consent forms or other written materials.

Signage: Post signs informing patients that they might be treated by independent contractors who are not your employees/agents.

Advertising: Review advertising and marketing materials to determine whether they would give

patients the impression that independent contractors are employees/agents. For example, if a group uses independent contractor physicians and nurses, advertisements that proclaim "our doctors and nurses are here for you" can imply an agency relationship due to the use of word "our."

Consent Forms: Inform patients that their care may be provided by an individual who is not your employee/agent.

Patient Billings: When providing billing services for independent contractors, add language to the bill that explains that the treating independent contractor is not an employee/agent. Using different letterhead for independent contractor billing can further distinguish the relationship.

Contracts: When contracting with a group or individuals to provide medical services, add language in the contract that specifies that the providers who are to perform services under the terms of the contract are independent contractors and are not employees/agents.

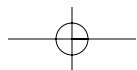
Bylaws: Include a statement indicating independent contractors are not employees/agents in your medical staff bylaws, corporate bylaws or other rules and regulations adopted by your healthcare entity.

Lab Coats/Scrubs: Do not allow independent contractors to wear clothing or badges with your name or logo on them.

Business Cards: Do not allow providers who are independent contractors to use your name or logo on their business cards.

Office Signage: Utilize different signage for independent contractors' private offices.

Stationery: Do not permit independent contractors to use your stationery when they are not acting as employees/agents.



Prescription Pads: Do not permit independent contractors to use prescription pads containing your name and/or logo.

Staff Training: Train your staff to distinguish between employees and independent contractors. For example, a receptionist who uses the phrase “one of our doctors will see you now” is implying the doctor is an agent/employee, not an independent contractor. Also, consider how easy it is for a staff member or interpreter to confuse these relationships when they are translated to a patient who speaks a foreign language.

Conclusion

Controlling the risk of vicarious liability for the actions of an ostensible agent requires accurate appearances. Patients should know when they are being treated by an independent contractor. If you share office space, make sure patients do not assume the existence of a partnership among you and your officemates. These seemingly obvious recommendations can add an additional layer of liability defense between you and another provider’s unrelated, injured patient. ■

Notes

¹ Case Study derived from *DiBenevento v Ray*, 2001 NY Slip Op 40470U, 2001 N.Y. Misc. LEXIS 666 (2001).

² Case Study derived from *Mejia v. Community Hospital of San Bernardino*, 99 Cal. App. 4th 1448, 122 Cal. Rptr. 2d 233 (2002).

³ Matthew T. Wall, JD. Ostensible Agency Liability in Texas. Available at: www.newalbanylawyer.com/article5.shtml (accessed 10/12/2007).

Focus on Health Literacy

Accessing Health Literacy-Appropriate Patient Materials

Most patient education handouts are written at a difficulty level that exceeds the reading skills of the majority of patients. The following websites are a few of the many that provide access to free or low cost patient-friendly written materials about various health conditions:

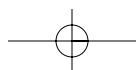
Diabetes, Digestive Diseases, Kidney Diseases, Urologic Diseases. Available from the National Institute of Diabetes and Digestive and Kidney Diseases at: www2.niddk.nih.gov/HealthEducation/HealthEzToRead (accessed 9/13/2007).

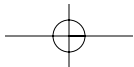
Heart Attack Signs. Available from the National Heart, Lung, and Blood Institute (NHLBI) at: www.nhlbi.nih.gov/health/public/heart/mi/handout_en.htm (accessed 9/13/2007).

Prostate Cancer. Available through Channing L. Bete Co., Inc. at: www.channing-bete.com (accessed 9/13/2007).

Acne, Alopecia, Osteoporosis and Arthritis, Back Pain, Connective Tissue Disease, Eczema, Gout, Lupus, Marfan Syndrome, Rosacea, Sports Injuries. Available from the National Institute of Arthritis and Musculoskeletal and Skin Diseases at: <http://www.niams.nih.gov/hi/index.htm> (accessed 9/14/2007).

For a more extensive list of health literacy-appropriate patient publications and guidance on how to develop your own patient-friendly material, see “Culture, Health and Literacy: A Guide to Health Education Materials for Adults with Limited English Literacy Skills.” Available on the World Education website at: www.worlded.org/docs/Culture_Health_Literacy.pdf (accessed 9/13/2007).





560 Davis Street, Suite 200
San Francisco, CA 94111-1966

Prsrt. Std
U.S. Postage
PAID
Permit #2325
San Diego

Inside . . .

Ostensible Agency:

When Appearances Lead to Vicarious Liability

ClaimsRX

clinical & risk management perspectives

November 2007

NORCAL Claims Rx Editorial Board

Editor

Mary-Lynn Ryan
Consulting Risk Management Specialist

Content Advisors

Patricia A. Dailey, MD
NORCAL Board of Directors

David R. Holley, MD
Secretary/Treasurer,
NORCAL Board of Directors

Harry B. Richardson, Jr., MD
NORCAL Board of Directors

William R. Vetter, MD
NORCAL Board of Directors

Michael Stephens
NORCAL Board of Directors

Newell E. Warde, PhD
NORCAL Board Advisory Council
Executive Director, Rhode Island
Medical Society

James Sunseri
President & CEO, NORCAL

Stephen M. Farber
Vice President, Risk Management, NORCAL

Marlene Nazarey, RN, MSN
Manager, Risk Management, NORCAL

Barbara Halliday, CPCU
Supervisor, Claims Department, NORCAL

Neil Simons
Director, Underwriting Operations, NORCAL

Jane Tishkoff, Esq.
Associate Vice President and
Assistant General Counsel, NORCAL

©2007 NORCAL Mutual Insurance Company.
Reproduction permissible with written permission and credit.

Direct inquiries to:
NORCAL Mutual Insurance Company
Risk Management Department
560 Davis Street, Suite 200
San Francisco, CA 94111-1966
(800) 652-1051

The information in this newsletter is obtained from sources generally considered to be reliable; however, accuracy and completeness are not guaranteed. The information is intended as risk management advice. It does not constitute a legal opinion, nor is it a substitute for legal advice. Legal inquiries about topics covered in this newsletter should be directed to your attorney.

Guidelines and/or recommendations contained in this publication are not intended to determine the standard of care, but are provided as risk management advice. Guidelines presented should not be considered inclusive of all proper methods of care or exclusive of other methods of care reasonably directed to obtain the same results. The ultimate judgment regarding the propriety of any specific procedure must be made by the physician in light of the individual circumstances presented by the patient.

Visit NORCAL Mutual on the Internet at www.norcalmutual.com.

547K-RM

