

Claims RX

clinical & risk management perspectives

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How to Avoid Liability for the Negligence of Independent Contractors

CME Information

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Method and Medium

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Learning Objectives

By reviewing the cases presented in this course and implementing the risk management recommendations, you will increase your ability to:

- Promote patient and staff awareness of the legal and business relationship(s) that exist among the providers and entities that are providing healthcare
- Establish appropriate communication behaviors, agreements, bylaws and policies that can reduce vicarious liability risk exposure

Target Audience

All providers

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Editor

Mary-Lynn Ryan
Consulting Risk Management Specialist, NORCAL

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Dustin Shaver
Manager, Risk Management, NORCAL

Paula Snyder, RN, CPHRM
Manager, Risk Management, PMSLIC

John Resetar
Supervisor, Claims Department, NORCAL

Planners

Jo Townson
Risk Management Specialist, NORCAL

Sonia Rutherford
Risk Management CME Program Services
Coordinator, NORCAL

Introduction

NORCAL Mutual has noted a recent trend of claims against medical groups for the alleged negligence of an independent contractor to whom a patient has been referred by the group or one of its physician employees. In most cases, an independent contractor is liable for his or her own negligence. But in these cases, the patient alleges that the independent contractor is an ostensible agent of the group because an employee-physician of the group made the referral. In other words, the patient alleges that the group is vicariously liable for the injuries caused by the independent contractor to whom the patient was referred. Ostensible agency vicarious liability can also arise in circumstances where independent contractors are brought into the practice setting to provide certain patient care services. In either scenario, the patient alleges that it was reasonable to believe that the independent contractor who allegedly injured him/her was an employee of the medical group.

In many states, ostensible agency vicarious liability involving physician groups and independent contractors is a developing area of the law. Frequently, whether a group will be found liable for the negligence of an independent contractor depends on the opinion of the judge or jury who hears the case. How a case is decided is often heavily dependent on the facts surrounding the relationships of the defendant healthcare providers. When groups have made documented efforts to educate patients about their relationship with independent contractors and have put contracts in place that clearly define that relationship, it is more likely that an ostensible agency claim will be successfully defended.

This *Claims Rx* uses NORCAL Mutual closed claims to introduce strategies aimed at diminishing the risk of ostensible agency vicarious liability.

Note: For guidance on NORCAL Mutual underwriting guidelines and requirements related to group practices, contact NORCAL Policyholder Services at (877) 443-7232.

Definitions*

Various terms are frequently used (and confused) in any discussion of ostensible agency. Here are definitions of several of the most important terms:

Vicarious Liability: Vicarious liability allows an injured person to hold a third party financially responsible for the wrongful acts of the party that injured him/her. Vicarious liability arises in a variety of legally-recognized relationships, including those between employer and employee and partners in a partnership. For example, when a medical group hires physicians as employees, the medical group will be held vicariously liable for the negligence of the employee physicians.

Agent: An agent is a person who is authorized by a principal to act for him/her. In an employment scenario, the employee is the agent and the employer is the principal. In general, when an agency relationship exists, the principal can be held vicariously liable for the negligence of the agent.

Principal: A principal is a person or entity that permits or directs another (e.g. an agent) to act for the principal's benefit. The agent is subject to the principal's direction and control.

For example, the employees of a medical group are subject to the medical group's direction and control.

Independent Contractor: An independent contractor is a person who contracts with another person or entity to provide some service, but who is not subject to the other's control of the performance of the undertaking for which the person has contracted. For example, generally a hospital would not be vicariously liable for the negligence of independent contractor physicians.

Ostensible Agent: An ostensible agent is a person who reasonably appears to be the agent of another. For example, if a patient's primary care physician (PCP) refers the patient to "our cardiologist" and the PCP's medical group bills for the cardiologist's services, the patient might reasonably believe that the cardiologist is an employee or agent of the group, when the cardiologist is actually an independent contractor. In that case, a court might find that the cardiologist is an ostensible agent of the group, which would result in the group being vicariously liable for the cardiologist's negligence.

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

Referring Patients to Independent Contractors

In the following case study, the patient was able to show that she could reasonably believe that an independent contractor, whose office was not located in the same building as the referring physician, was the ostensible agent of the group employing the referring physician.

Case Study #1

Allegation: Because the vascular surgeon was an ostensible agent of the medical group, the medical group was liable for his alleged negligence.

The patient, a 52-year-old woman, was diagnosed with diabetes in 1998. She was a long-term patient of a PCP employed by the medical group that owned and operated the clinic where she was treated. Despite significant diabetes management efforts over the years, the PCP had not been able to convince the patient of the importance of complying with diet, medication and lifestyle-change recommendations.

On June 3, 2005, the patient presented with a small puncture wound in the base of her big toe. The PCP found no signs of infection. He debrided the area, washed it, and administered an antimicrobial dressing. At her wound check a week later, the PCP debrided and cleaned the wound again, applied an Accuzyme dressing and told the patient to keep her leg elevated and dry. He started her on antibiotics, but two weeks later, seeing that her condition had not improved, he referred her to a vascular surgeon.

On June 20, the patient consulted with the vascular surgeon, a solo practitioner who contracted with the medical group to treat its patients. His office was in a different building from the clinic. The vascular surgeon diagnosed the patient with cellulitis and necrotic ulcer of the big toe. He saw her one more time and then transferred the patient to an infectious disease specialist.

On July 2, the patient had her right first and second toes amputated in the hope that the lower extremity could be salvaged. The infectious disease specialist treated the patient with antibiotic therapy and hyperbaric oxygen therapy. Still, the ulcer did not improve. On August 1, the patient underwent a below-the-knee amputation.

Shortly thereafter, the patient filed a malpractice lawsuit against the vascular surgeon, PCP and the medical group, contending that the delay in treatment and/or negligent treatment resulted in the amputation of her lower right leg.

Issues Complicating the Defense

During the trial, the judge ruled that the vascular surgeon was an ostensible agent of the group, and therefore the group would be vicariously liable for his alleged negligence. The judge based his determination on a number of factors, including:

- The patient supported her allegation that she believed that the vascular surgeon was an employee of the group with testimony that the PCP had referred to the vascular surgeon as “our vascular surgeon.”
- The vascular surgeon testified that the group had considerable control over his medical decision-making. His contract with the group supported his testimony. It gave the group a significant amount of control over procedure approvals and treatment reimbursement. In the judge’s opinion, the vascular surgeon was treated as if he were an employee, not an independent contractor.

Due to the probability of the jury deciding in favor of the patient, the case was settled.

Risk Management Recommendations

Groups can help patients understand that they are being referred to an independent contractor in a variety of ways, including the following:

- Send patients referral letters (approval letters) that include language in large noticeable print regarding a consultant’s independent contractor status. For example, the letter could contain the sentence: “Please be advised that this individual is not our employee or agent, but is an outside contractor who has contracted with this group to provide services.”
- Put a disclaimer in bold, noticeable print in annual member booklets regarding the services available from the group. For example, the booklet could contain the sentence: “Any third-party contracted provider you see is not our agent or employee.”

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- Create a “Conditions of Admission” form, similar to those used by hospitals, which informs patients that the specialists to whom they may be referred are independent contractors.
- Provide lists of specialists to patients that include statements that the specialists are not agents or employees and that they exercise independent judgment.
- When referring a patient, do not describe the consultant in a way that could create the appearance of agency. For example, avoid statements such as, “We’re going to refer you to one of our physicians” or “We’re sending you to Dr. X, who handles all our vascular surgery patients.”
- To the extent that the patient’s insurance/health plan allows it, the patient should be informed that he or she has the right to choose to whom they wish to be referred.
- Train staff to distinguish between employees and independent contractors.

In addition to fostering patient education, medical groups should avoid entering into contracts that give the group too much control over an independent contractor’s interaction with patients. A contract that gives the group control over things like treatment plans and reimbursement can be interpreted as a contract of adhesion, which can be used to support agency allegations. An excellent way to ensure that the group’s interests are being properly protected is to have a business/corporate attorney review contracts made with outside providers. Ideally, the agreement language would support utilization review functions and enforcement while acknowledging and respecting the outside provider’s independent medical judgment. A balanced contract should be sought.

Translating Patient Forms and Educational Materials

Getting a patient to understand that a consultant is not an employee can be particularly challenging when the patient has trouble understanding English. Even qualified translators with healthcare experience may not appreciate the importance of making a distinction between an employee and a contracting physician. (In most instances, a family member will not be considered a qualified translator.)

Group practices are encouraged to determine the predominant languages spoken by patients and have forms, referral letters and patient educational materials translated into those languages. When such materials are not available in a patient’s native language, ensure that the English-language version is translated for the patient by a qualified interpreter. Through the interpreter, ensure that the patient understands the form. This can be accomplished using the “teach back” method, that is, by having the patient describe what he/she understands about what was explained. Include a copy of the signed form in the patient’s file, and document the name of the interpreter and the process that took place to ensure that the patient understood that referral physicians were independent contractors.

Translation/Interpretation Organizations

Listed below is a selection of the many organizations that are available for guidance on obtaining translators and interpreters:

- American Translators Association (www.atanet.org)
- National Council on Interpreting in Health Care (www.ncihc.org)
- International Medical Interpreters Association (www.imiaweb.org)
- California Healthcare Interpreting Association (www.chiaonline.org)

More information about optimizing communication with non-English speaking patients can be found in the Cultural Competency & Health Literacy CME monograph, which is available on the NORCAL website through MyCME or at: www.norcalmutual.com/cme/cme_culturalcompetency.php (accessed 7/20/2009).

Independent Contractors Treating Patients in Medical Group Offices

It is easy to imagine how an independent contractor who treats a patient in a medical group's examination room or surgery suite could be mistaken for an employee of the physician group. Without evidence that the patient was at some point informed of or should have surmised the independent contractor's status, it is difficult to defend ostensible agency allegations in such situations.

Case Study #2

Allegation: *Because the phlebotomist was an ostensible agent of the medical group, the group was liable for her negligence*

A patient presented to a medical center for pain in her lower back. She was examined by her PCP, an employee of a medical group located in the medical center. The PCP recommended an ultrasound and blood tests to check for a bladder infection or kidney stones. While she was waiting in the examination room to be taken for the ultrasound, a phlebotomist employed by an independent lab came into the room to take her blood. While her blood was being drawn, the patient fainted, fell to the floor and injured her shoulder.

The patient filed a lawsuit against the medical center, the medical group, the phlebotomist and the lab. Her sole allegation was that the phlebotomist failed to protect her from falling. She claimed that the phlebotomist was either an agent or ostensible agent of the other defendants.

During the course of litigation, the patient settled with the lab for a significant sum, but she continued to pursue additional compensation from the medical group and the medical center. After various hearings and negotiations, she ultimately agreed to drop both claims.

Discussion

This claim is an excellent example of how a medical group can find itself in the middle of a medical liability lawsuit involving a provider for whom it should have no risk of liability exposure. Because the phlebotomist treated the patient in a medical group examination room, it was logical for the patient to assume that the medical

group was the phlebotomist's employer. Unfortunately, there was no evidence to contradict the patient's claim that she believed the phlebotomist to be an employee of either the group or the medical center.

The following claim illustrates a similar basis for the plaintiffs' ostensible agency allegations, although in a different treatment environment.

Case Study #3

Allegation: *The urgent care group was liable for the negligence of an independent contractor physician treating patients at the urgent care facility*

On May 8, 2004, the patient, a newborn female, was brought to a primary care group for her first well-baby appointment. She was noted to be healthy with no abnormalities. On September 14, the patient was brought to an urgent care facility owned by a different medical group but located in the same building as the primary care group. Physician #1, who was employed by the primary care group but was treating urgent care patients as an independent contractor, thought the child was suffering from a viral process and suggested conservative treatment. He did not think the patient was ill enough to warrant an emergency department (ED) visit. The parents were advised to watch for a stiff neck and call if the child's condition worsened.

On September 15, Physician #2 examined the patient at the primary care group for ongoing fever, failure to eat and neck stiffness. Physician #2 diagnosed pneumonia, placed her on Zithromax and gave her a Rocephin injection. Later that same day, the patient's parents brought her back to the primary care group reporting that the patient had been shaking. She was examined by Physician #3, who believed the shaking was associated with the chills the child was experiencing as a result of the fever. On September 20, Physician #3 again examined the child. He noted that the child had no clear signs or symptoms of meningitis or pneumonia and advised the parents to keep her on Zithromax until the prescription was finished.

On September 21, Physician #3 examined the patient for a slightly elevated fever. He felt the patient appeared normal and was improving, and he told the parents to

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bring the patient back in two weeks. On September 22, the mother called Physician #3 and reported that the patient still had a fever. Physician #3 told the mother to continue giving the patient acetaminophen. On September 23, the parents brought the patient to the primary care group complaining that she had odd facial expressions. Physician #3 thought that the patient might be experiencing partial seizures and had the patient immediately taken to the ED. A lumbar puncture suggested meningitis. She responded slowly to treatment but was ultimately discharged from the hospital at the end of October. Hearing tests revealed severe hearing deficits in both ears.

The parents filed a malpractice action against the primary care group and the urgent care group. The primary care group settled for a significant amount. Due to the risks associated with proceeding to trial with only the urgent care group as a defendant, the case was settled on the group's behalf.

Discussion

The bulk of liability in this case concerned the care rendered at the primary care group, but the plaintiffs' attorney decided to pursue the urgent care group under an ostensible agency theory (i.e., the plaintiffs alleged that Physician #1 was an ostensible agent of the urgent care group). It was difficult to determine who was liable for Physician #1's alleged negligent treatment in the urgent care due to the lack of documentation on the relationship between Physician #1 and the urgent care group. The physicians who owned and operated the primary care group and those who owned and operated the urgent care group were longtime colleagues who did not feel it was necessary to have formal contracts between each other. The contract that Physician #1 had with the urgent care group covered little more than how Physician #1 was to be paid for his services. It had never been reviewed by an attorney.

In addition to the ambiguities surrounding Physician #1's relationship to the urgent care group, there was the issue of dress. When he was treating urgent care patients, Physician #1 wore a name badge and lab coat with the urgent care group's name and insignia. There was little evidence to support the defense position that the plaintiffs

should not have assumed that Physician #1 was an employee/agent of the urgent care practice.

Risk Management Recommendations

The following risk management recommendations can be applied to any treatment scenario where physician group employees and independent contractors treat patients in the same environment:¹

- Have a business/corporate attorney review independent contractor agreements. Contracts between groups and independent contractors that are ambiguous can compromise the interests of both parties if they become evidence during litigation.
- Include a statement in the group's bylaws or other rules or regulations that indicates that independent contractors are not employees/agents.
- Post signs informing patients that the independent contractors who may treat them are not the group's employees/agents.
- During the informed consent process and on consent forms, inform patients that their care may be provided by an independent contractor rather than an employee.
- When billing for the services of independent contractors, add language to the bill that explains that the treating independent contractor is not an employee/agent. Consider using different letterhead for independent contractor billing.
- Do not allow independent contractors to wear clothing or badges with the group's name or logo on them.
- Do not allow independent contractors to use the group's name or logo on their business cards.
- Do not permit independent contractors to use the group's stationery or to use prescription pads with the group's name or logo.
- If independent contractors have private offices on the group's premises, use different signage for their offices.
- Clearly identify separate practices with appropriate

signage, both on the entrance door and inside the office space.

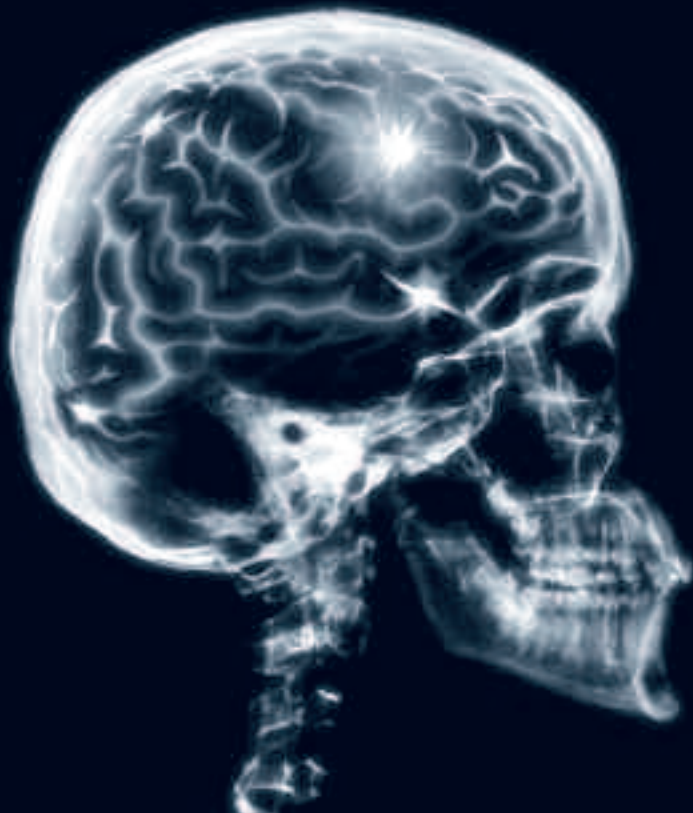
- Use separate check-in areas and support staff for each practice.
- Do not use common advertisements or share a telephone number.
- Do not share professional employees, such as nurses, medical assistants or technicians.

Conclusion

Controlling the risk of vicarious liability by operation of an ostensible agency means controlling appearances. When they are being treated by an independent contractor, patients should be helped to know what this means. Implementing the risk management recommendations in this article can add an additional layer of liability defense between your group and a contracting provider's injured patient.

Endnote

¹Matthew T. Wall, JD. Ostensible Agency Liability in Texas. Available at: on the Association of Texas Hospitals website at: www.thainsurance.com (accessed 7/20/2009).



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

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