The perils of vicarious liability

WHY YOU MAY BE RESPONSIBLE FOR THE PROFESSIONAL ACTIONS OF THE PHYSICIAN WITH WHOM YOU SHARE SPACE

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The terms “apparent agency” and “vicarious liability” sound like nebulous legal theories, but they can land you in court, or at least cost you attorney’s fees if you’re named in a lawsuit.

Most physicians realize that they are responsible for the professional actions of their office staff and those who are directly employed by their practice. Many physicians are unaware, however, that they can be sued for the actions of those they don’t employ.

First, let’s define a few terms:

- **Vicarious liability**—liability for an injury that is imposed on a person who did not act negligently, but who has imputed or actual legal ties to the party that did cause the injury.
- **Independent contractor**—an individual who performs a job such that even if the job is performed negligently, the negligence stays with the individual. The law specifies that if no one other than the contractor controls the time, manner, method, or place of the services, then that person is an independent contractor and there is no vicarious liability.
- **Apparent agency**—a relationship that is imposed by law when a principal leads a third party to reasonably believe that another is the principal’s agent, and the third party is injured by relying on, and acting in accordance with, that
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“AVOID COBRANDED ADVERTISING UNLESS IT CLEARLY SPECIFIES THAT TWO DIFFERENT PRACTICES ARE BEING ADVERTISED.”

belief. This court-made doctrine attempts to create liability for the acts of an independent contractor for an otherwise faultless individual or corporation—for example, a hospital being held liable for the negligence of an emergency department physician who is an independent contractor.

WHAT A REASONABLE PERSON VISITING THE OFFICE WOULD THINK

Now, let’s look at a litigation scenario that could arise when two physicians share space.

Dr. Adam and Dr. Baker share 2,500 square feet of office space. Together, they employ a receptionist, a registered nurse, and a bookkeeper/billing clerk. They each signed the landlord’s 5-year lease and personally guaranteed the performance of the lease. One of Dr. Adam’s patients had a biopsy performed, and the hospital pathologist sent the report to the physician’s office, where the receptionist misplaced it. The patient didn’t learn of the biopsy results—which were positive and indicated that he needed prompt treatment—until he mentioned the test during a routine office visit the next year. A lawsuit followed naming Dr. Adam, the Adam & Baker Medical Practice, Dr. Baker, the receptionist, and the registered nurse. The patient alleged in the lawsuit that the delay in notifying him of the positive biopsy result placed him at substantial risk of a poor treatment outcome.

No actual agency relationship exists between the physicians; they are just sharing common expenses. However, because a reasonable person visiting the office may view this situation as a group practice, a patient filing a medical malpractice lawsuit against one physician in the group may, therefore, name the other physician, alleging vicarious liability and apparent agency. The question of whether the conduct of the parties created the perception for the patient is one for a trial court to determine based on factual and legally sufficient evidence.

Frequently, physicians not involved directly in a plaintiff/patient’s care are dismissed from an action such as this one. In the case of Dr. Adam and Dr. Baker, however, several facets of the space-sharing relationship might prevent—or, at the very least, complicate—early dismissal for Dr. Baker. These include but are not limited to:

- **Advertising.** The “apparent agency” perception begins the minute the patient becomes aware of your practice through advertising. Avoid co-branded advertising unless it clearly specifies that two different practices are being advertised.
- **Phone.** Answering a common phone line with “Drs. Adam’s and Baker’s office” gives patients the impression that the two are connected. Whenever possible use separate phone and fax lines for each physician. If doing so is impractical, then instruct office personnel to answer the phone by saying, “Dr. Adam’s office and Dr. Baker’s office,” thus distinguishing between the two practices.
- **Signage.** How the practice is listed in the lobby, signage on the door, and signage within the space is very important. In this example, the signage should not read “Drs. Adam & Baker” or “Adam & Baker Clinic.” Separate and distinct signs should be posted in each area distinguishing the two practices. Further, the nametags and attire worn by your staff shouldn’t have a co-branded message. Some states have very specific legal criteria as to what constitutes proper notice to patients. For example, Georgia’s statute for hospitals trying to avoid agency liability goes so far as to define the size of the letters on the sign. Check with your local medical society to see whether your state has specific requirements.
- **Registration forms.** The relationship between the physicians should be specified during the office registration process. Such a disclosure on the initial patient intake and history form, or a separate sheet for the patient to sign—acknowledging that the patient understands that the physicians are not in practice with one another, do not participate in the practice management of the other, and are independent contractors—is important. Here’s an example of language your practice might use in such a form:

The physicians in this office are not partners or otherwise affiliated in the same medical practice, nor do they manage each other. Each physician is an independent practitioner and simply shares office space, equipment, and some staff in his/her separate practice. The doctors are not responsible for each other’s practices nor for the care rendered to each other’s patients.
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“AS WITH MOST BUSINESS DEALINGS, BEFORE SHARING OFFICE SPACE WITH OTHER PHYSICIANS, TAKE THE TIME TO KNOW THEM AND THEIR BACKGROUNDS.”

- **Patient forms/stationery.** All charting forms, if labeled, ought to be labeled with the individual physician’s name and not be cobranded. Any letterhead paper, prescription pads, or other documents used by both physicians should be separate and distinct from one another.

- **Billing statements.** Many space-sharing physicians use a common billing system, because the addition of a provider to an existing system is far less costly than establishing a new system. The questions that need to be asked relative to this situation: Will the billing system print separate invoices for each provider with separate physician identification? If a patient is seen by multiple providers within the space-sharing arrangement, is the invoicing aggregated? To prevent “apparent agency” and/or “vicarious liability” issues, send bills that specify which physician is billing for what service. Avoid generic titling such as “Offices of Dr. Adam and Dr. Baker.”

- **Shared employees.** Often, the employees in a space-sharing arrangement portray a cohesiveness to patients that does not exist between the physicians. In an effort to blur the lines, plaintiffs’ attorneys typically ask employees who they work for while performing different functions. Complicating matters, one space-sharing physician might pay all the employees from his or her payroll account and then seek reimbursement from the other physicians sharing space. More often than not the “master employer” in these situations becomes responsible for the actions of the employees, even those he or she does not supervise.

POWER POINTS

You can be sued for the actions of those you don’t employ.
Whenever possible, use separate phone and fax lines for each physician sharing office space.

Send bills that specify which physician is billing for what service.

Consult with your insurance adviser to determine what is needed to protect you from vicarious liability allegations.

LEASING AND SUBLEASING OFFICE SPACE

Space-sharing arrangements also give rise to questions about whose name is on the lease and who is subleasing the space. If both doctors signed the lease and guarantees, should one of them leave without honoring the lease terms, not only will that physician be liable, but so will the other. That’s because almost all leases provide joint and several liability, holding each physician responsible for the entire amount due under the lease—not just for half. Is the sublease with or without the consent of the landlord?

Without proper counsel and arrangements, a plaintiff could allege that a space-sharing arrangement is really a general partnership. Such partnerships can exist in the absence of any documentation, and all partners are jointly and severally liable for all partnership debts, including lawsuits. If the physicians refer to one another, regulatory considerations exist as well. Do the doctors comply with fraud and abuse guidelines when sharing imaging or other equipment?

TAKE THE TIME TO KNOW THE OTHER PHYSICIANS

As with most business dealings, before sharing office space with other physicians, take the time to know them and their backgrounds. Be sure these physicians have references, credit ratings, and credentials that you believe are acceptable. Then have your insurance adviser review insurance policies to identify what coverage is available or may be needed to protect you from vicarious liability allegations, and consult with a knowledgeable corporate attorney to assist you in forming business structures that protect your interests.

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