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Contracting With Non-Employed Physicians, Groups, and Other Providers: Key Terms and Practices to Avoid Problems and Minimize Liability

Protecting Against Ostensible Agency and Minimizing Liability Risk

TUESDAY, JANUARY 23, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Kim C. Stanger, Partner, **Holland & Hart**, Boise, Idaho

John R. Washlick, Shareholder, **Buchanan Ingersoll & Rooney**, Philadelphia

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Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Liability for Non-Employees: Beware Apparent Authority

Publication — 12/05/2016

As a general rule, hospitals and other healthcare providers are **not** liable for the acts of non-employed medical staff members, independent contractors or vendors; instead, each party is responsible for its own actions or those of its employees or agents who are acting within the scope of their employment or agency. However, courts are sometimes willing to hold a hospital or provider vicariously liable for the acts of non-employees under the doctrine of "apparent authority".

Apparent Authority. In *Jones v. Healthsouth Treasure Valley*, for example, the Idaho Supreme Court held that a hospital might be liable for the acts of an independent contractor if: (1) the hospital's conduct would lead a plaintiff to reasonably believe that another person acts on the hospital's behalf (*i.e.*, the hospital held out that other person as the hospital's agent); and (2) the plaintiff reasonably believes that the putative agent's services are rendered on behalf of the hospital (*i.e.*, the plaintiff is justified in believing that the actor is acting as the agent of the hospital). (147 Idaho 109, 206 P.3d 473 (2009)). The Idaho Supreme Court recently reaffirmed the apparent authority theory in *Navo v. Bingham Memorial Hospital*, 160 Idaho 363, 373 P.3d 681 (2016).

In both *Jones* and *Navo*, the trial court granted summary judgment to the hospital because an independent contractor committed the alleged malpractice, but the Idaho Supreme Court reversed the trial court. Significantly, the Idaho Supreme Court did not find either hospital liable for the acts of the contractor, but the Court concluded that the relevant facts, if proven, might lead a jury to find the hospital liable for the contractor's acts under the doctrine of apparent authority. The Court cited the following factors as supporting the theory of apparent authority:

- The hospital contracted with the contractor to provide relevant services to hospital patients.
- The hospital represented that the contractor was the "manager" of the hospital service line.
- Hospital advertisements did not disclose that services were performed by independent contractors.
- The hospital's consent forms did not identify the contractor as an independent contractor or expressly disclaim liability for the contractor's services.
- The consent forms used by the contractor were on the hospital's letterhead.
- The hospital allowed the contractors to use hospital scrubs and name tags bearing the hospital's name.

- The hospital billed the patient for the services performed by the contractor.

Courts in other jurisdictions which recognize the apparent authority theory have also cited factors such as the following:

- Whether the hospital supplied or assigned the contractor.
- Whether the contractor's services are typically provided in and as part of the hospital's services, *e.g.*, emergency room, anesthesiology, or radiology services.
- Whether there was notice to the patient that the contractor was independent of the hospital through, *e.g.*, advertising, consent forms, badges, oral communications, *etc*.
- Whether patient selected the provider or had prior contact with practitioner.
- Whether patient had special knowledge of contractual relationship.

Protecting Against Apparent Authority. Although *Jones* and *Navo* did not establish clear rules, the following actions may help hospitals and other providers defend against vicarious liability for contractors and other non-employees:

- Review your ads, websites, and other marketing information to ensure they do not suggest that contractors, vendors and others are acting as your agents. Representations such as "our staff…", "our specialists…", or "our team of experts" may suggest that the providers are agents of the hospital. You may want to expressly disclaim any agency or employment relationship by explaining that providers in identified specialties are not employed by the hospital, and that the hospital is not liable for their actions, *e.g.*, "[Specialty] services are provided by independent practitioners who are not employed by the hospital. Hospital is not responsible for the acts or omissions of such [specialty] practitioners."
- Include appropriate disclaimers in consent forms, registration materials, and similar documents that are reviewed by the patients. Such disclaimers should be written in plain language that the patient will understand. It should be conspicuous and not hidden in small print in a multi-page document. The disclaimer should identify and differentiate between employed and non-employed providers, and confirm that the hospital is not responsible for acts of non-employees. The more specific the disclaimer is, the better the chance that it will be effective. The consent may give the patient the option to change practitioners if desired. Obtain the signature of the patient or personal representative confirming that they have read and understood the documents, including the disclaimer of liability. The following language might work, depending on the surrounding circumstances:

  Practitioners at Hospital: *Many practitioners or consultants who participate in your care at Hospital are not employees of Hospital, including those who provide [specified specialty services, such as emergency department, anesthesiology,*

radiology, pathology, on-call specialty services]. Such practitioners must meet certain licensing and training standards; however, Hospital is not responsible for the care provided by such practitioners. If you wish to change any of your practitioners, please direct your request to your health care team.

- Ensure that the hospital's logo is removed from consent forms and other documents used by the contractor, and confirm that the contractor's consent form and other materials explain the relationship and the limits on the hospital's liability. Do not allow the contractor to use the hospital's logo without the hospital's express permission.
- Orally explain the contractor's relationship to the patient during the registration or consent process. Offer to answer any questions, then document the discussion in the medical record or elsewhere. Be consistent; the patient likely will not remember the discussion, so it will be important to document the discussion and/or make the discussion part of your standard business practice so that you can prove that the relationship was explained to the patient.
- Place prominent signs in services areas where patients may receive care from non-employees, *e.g.*, the emergency department, radiology department, *etc*. Again, signage such as the following might help:

  NOTICE. *Some of the health care professionals performing services in Hospital are independent contractors and are not Hospital employees or agents, including those providing services in [specify service line]. Independent contractors and practitioners are responsible for their own actions. Hospital is not liable for the acts or omissions of any such independent contractors or practitioners.*

- Distinguish the appearance of contractors from employees, *e.g.*, require that they use different scrubs and/or different name badges which confirm that the contractor is not a hospital employee.
- Require your medical staff and contractors to carry appropriate insurance. If the contractor has sufficient insurance the plaintiff's lawyer may have little incentive to pursue the hospital.
- Ensure your contractor agreements contain terms to help accomplish the foregoing, *e.g.*, require insurance; include indemnification provisions; prohibit contractors from representing themselves as agents of the hospital; require them to explain the relationship in consent forms or other written materials provided to the patient; and prohibit the use of the hospital's logo in materials without the hospital's express consent.

Legislation. Some states have passed legislation that limits liability for non-employees or the effect of apparent authority if the hospital or provider takes certain action, *e.g.*, the hospital posts signs confirming the

relationship and requires contractors to carry minimum insurance limits. States without such protections may consider pursuing same.

Conclusion. Although the apparent authority theory increases a hospital's or other provider's liability, it only applies when the provider has done something to create the impression of an agency relationship. The provider may minimize the risks by implementing the foregoing suggestions or otherwise ensuring that the patient knows that the provider is not liable for the acts of specified contractors or third parties. The provider's administration and risk managers may want to review their practices to ensure they are implementing appropriate steps.

For questions regarding this update, please contact:
Kim C. Stanger
Holland & Hart, 800 W Main Street, Suite 1750, Boise, ID 83702
email: kcstanger@hollandhart.com, phone: 208-383-3913