

Case study: Wallace v. Alexian Brothers Are apparent agency disclaimers fair?

Your facility may be focused on preventing negligent credentialing lawsuits, but don't overlook apparent agency claims, which can hold the hospital legally responsible when physicians providing healthcare services under a contract with the hospital are accused of medical malpractice.

In a recent case involving alleged malpractice and negligence, a patient died in the care of two physicians providing emergency services under a contract with Alexian Brothers Medical Center of Elk Grove Village, IL. The patient, a minor, was rushed to the ED, and when her mother, the plaintiff, arrived shortly thereafter, she was asked to sign a form acknowledging that she was aware that the physicians providing care to her daughter were not employees or agents of the hospital; rather, they were independent contractors who were responsible for their own conduct.

After the patient died, her mother filed suit against the two physicians for malpractice and the organization for negligence using the apparent agency theory.

The appellate court of Illinois, First District, Fifth Division, opined that although this theory has been upheld and applied in Illinois, Alexian Brothers was not responsible because the plaintiff failed to establish that the hospital did not adequately disclose the relationship of the two emergency physicians that she alleges were

responsible for her daughter's death. Therefore, the trial court's decision to grant summary judgment in favor of the hospital was affirmed by the Appellate Court.

Under the apparent agency theory, a patient can sue a hospital for the negligence of a physician if the patient perceived that the physician was an employee or agent of the hospital at the time care was rendered, says **Michael Callahan, Esq.**, an attorney at Katten Muchin Rosenman, LLP, in Chicago. By providing patients and family members with a form defining the physicians' relationship to the hospital, Alexian Brothers had, by the court's standards, released itself from apparent agency.

"The apparent agency theory is more prevalent in different jurisdictions. It's a big deal in Illinois," says Callahan.

In *Gilbert v. Sycamore Municipal Hospital* (1993), the Illinois Supreme Court ruled that plaintiffs alleging apparent agency must prove that the physicians presented themselves as employees or agents of the hospital, the hospital had knowledge that the physicians represented themselves as employees or agents of the hospital and allowed them to do so, and the patient relied on the conduct of the hospital or the agent consistent with ordinary

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care and prudence. However, the plaintiff was not able to meet those requirements.

The disclosure debate

Arguments can be made on either side of the apparent agency fence. **John Gismondi**, a plaintiff's malpractice attorney at Gismondi & Associates in Pittsburgh, believes that written disclaimers should not prevent a patient from holding the hospital liable when a contracted physician provides inadequate care because most patients don't understand that the majority of physicians are not employees or agents of the hospital.

"[This opinion] doesn't reflect the realities of the patient's relationship with the hospital," Gismondi says.

Most patients don't read or understand the numerous forms presented to them in the ED because they are too distraught, and the opportunities for patients to ask questions regarding the forms they sign are often few and far between, he says.

In addition, Gismondi adds, "Hospitals want to distance themselves from the physicians when it comes to legal liability, but when it comes to advertising and attracting patients, they tie the identity of the institution with the quality of care being provided by the doctors." This two-sided representation of the physician-hospital relationship may confuse patients.

Callahan argues that hospitals should not be held responsible if contracted physicians commit malpractice. "[Contracted physicians] are not employees. They operate in their own departments using their own protocols and procedures, and [the contract group has] their own insurance," he says.

All hospitals can do is thoroughly screen physicians and other clinical practitioners, says **Brad Reinke, MD, FACEP**, medical director and chief of emergency department services at Dameron Hospital in Stockton, CA. "They don't know what contractors will do until they get there, so to say the hospital is responsible for physician malpractice is stretching it," Reinke says.

That is, unless the hospital negligently credentialed the physician at the heart of the malpractice case—but that's an issue worthy of its own article.

Protect your facility with best practices

Hospitals commonly contract with medical groups to provide certain services, so hospitals in states that subscribe to the apparent agency theory often use disclaimer forms to protect themselves from being included in a malpractice claim.

For example, Dameron Hospital requires all patients to sign a Conditions of Admissions form, which states that all physicians, surgeons, radiologists, pathologists, anesthesiologists, emergency services personnel, etc., are independent, says **Linda Ford, CPCS, CPMSM**, director of medical staff services.

If your hospital is in a state that upholds the apparent agency theory, Callahan suggests these other best practices to clarify physicians' relationship to the hospital:

- Ensure that the form is written in plain, understandable language.
- Post signs throughout the facility explaining the physicians' relationship to the hospital and that patients will receive separate bills from the contracted medical group.
- Require that contracted physicians wear name tags and uniforms distinct from those worn by the licensed independent practitioners and employed physicians who do not work under contract.
- Require physicians to provide patients with a verbal disclosure summarizing what is stated on the form. Patients should then verbally acknowledge that they understand, and the physician should document the disclosure and acknowledgement in patients' medical records.

By employing one or more of these methods to communicate with patients, your facility decreases the likelihood of being involved in a physician malpractice case under the apparent agency theory. ■