

The Ins and Outs of Vicarious Liability

By Barron Bixler

It would seem perfectly logical to assume that your liability as a physician begins and ends with the standard of medical care you deliver to your patients. After all, the rigorous practice of good medicine should provide you some universal guarantee of protection, shouldn't it? But the truth is that practicing even textbook medicine won't protect you against liabilities stemming from the clinical and business relationships you establish with other physicians and health care professionals. Generally referred to as "vicarious liability," these direct and indirect liability exposures can crop up in the most surprising and unexpected places. In fact, just placing your name on an office door next to another physician's name may entitle a patient to sue you for that physician's alleged negligence. But we're getting ahead of ourselves. Let's begin with the basics.

What is vicarious liability?

Under the general principles of tort law, a partner may be held liable for the acts of another within the context of their joint undertaking of the practice of medicine. This is true not only in instances

where a formal partnership agreement exists, but also in instances where a plaintiff's attorney can prove the existence of an "ostensible" partnership. "Ostensible" basically means "apparent" or "perceived"—it also means "superficial." Don't feel bad if this concerns you. It should. There are a handful of common actions or shared resources that indicate that you might be involved in an ostensible partnership with another physician (listed in order of significance):

- Using common letterhead and billing statements
- Seeing each other's patients on a regular basis
- Sharing overhead expenses
- Sharing professional employees, such as RNs and technicians
- Placing both your name and the other physician's name on an office door

If the commonalities include only office space and overhead expenses, and every other practice feature is separate, then your practice presents very little potential for vicarious liability. However, there are exceptions to every rule (as many exceptions as there are attorneys to dream them up). Of course, explicit contractual relationships almost always create the potential for shared liability. Also, a medical corporation (and

indirectly its directors, shareholders, and all physician employees) may be held liable for the acts of a single physician employee acting within the scope of his or her authority as an employee of the corporation.

Why is vicarious liability bad?

Aside from the obvious answer to this question, being that you could be subject to direct financial liability for an act you did not perform, vicarious liability becomes complicated when different people in the vicarious liability "chain" carry different medical liability insurance limits. (These are referred to as "deep pocket" scenarios.) For example, if you share resources and office space with another physician who carries \$1 million/\$3 million limits of liability, and you carry \$2 million/\$4 million limits, a patient dissatisfied with the care provided by the other physician could choose to sue you because you represent a "deeper pocket," so to speak.

Vicarious liability can also create a situation whereby two or more physicians, each represented by a different medical liability insurer, are named as defendants in a single claim. When this occurs, your insurer's ability to control both the direction and quality of your defense is seriously compromised be-

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cause there may be competing—and even conflicting—interests in the case.

How to reduce vicarious liability

To cut down on overhead expenses and improve administrative efficiencies, many solo-practice physicians choose to share common actions and resources with other physicians located in the same office space. While these actions may not create an ostensible partnership on their own, assessed in combination with other factors they may create a vicarious liability situation. To reduce your liability, it is best to separate the medical practices as much as possible. Following are a few examples of how you can do this:

- Do not share common billing statements and letterhead.
- List names separately on the office door.
- Do not share professional employees.

Always assess your practice setup from a patient's perspective—could it be perceived that you are practicing in a partnership or corporate setting? If so,

you may unknowingly be involved in a situation that could make you the target of a medical liability claim filed against another physician.

A solution to vicarious liability

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

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

Referred to as the “All or Nothing” rule, these are guidelines that many medical liability insurers apply to the formal partnerships they underwrite, including employer-employee relationships and medical groups. By following these conditions, insurers eliminate the potential for deep-pocket scenarios and also ensure that if a vicarious liability claim does arise, there aren't multiple carriers involved in de-

fending different interests in the claim to different standards.

Avoiding risk

In addition to the potential financial impact of a vicarious liability claim, just being named in a suit could mean time away from your practice, acute emotional stress, and uncertainty about the future of your practice. In addition, depending on the legal status of the case, a vicarious liability claim could show up on your claim run that is released to third parties, such as hospitals and health care plans.

The best way to avoid the risks associated with vicarious liability is to ensure that the information your medical liability insurer has on file for your practice situation is accurate and up-to-date. If you are entering a new practice setting, you should contact your insurer to discuss how best to diminish your exposure to vicarious liability. □