

Holding Out – The Risks of Ostensible Agency

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Ostensible Agency

The Great Irony

- We stand with our doctors 110%... until they make a mistake...
- We stand with our rainmakers 150%... so should we write big settlement checks to pay for their errors?
- Why should we pay?
- Why are we the excess carrier?

Mejia Predecessors

- Stanhope (1942)
- Seneris (1955)
- Quintal (1964)
- Jacoves (1992)
- Mejia (2002)

Mejia Progeny

- Romar (2007)
- Ermoian (2007)
- Van Horn (2010)
- Whitlow v. Rideout (2015)
- McCrosky v. Carson Tahoe (2017)

So it was “debatable whether a typical patient would understand...” that the hospital is not liable

The Only Win

- Markow (2016)

Physicians Are Independent Contractors

“In accordance with California law which prohibits the corporate practice of medicine, physicians are independent contractors and are neither employed by nor agents of this facility. ____ (Initial here)

These physicians may bill separately for their services.”

Definitions, Simply Stated

- An agent represents someone, called the principal, in dealings with third persons. (§2295)
- There are two types of agents, actual or ostensible. (§2298)
- An actual agent is “really employed” by the principal to represent the principal. (§2299)

Definitions... cont'd

- An agency is ostensible when the principal does something to cause a third person to believe that someone is an agent when the so-called agent is not actually an agent. (§2300)
- An employee is someone who is engaged by an employer “to do something for the benefit of the employer...” (§2750)

JURY INSTRUCTION

- the hospital caused the plaintiff to believe that the doctor was the agent of the hospital; and
- in reliance upon the apparent authority, the plaintiff incurred some liability or parted with something of value.

BAJI 13.20.5

Mejia v. Community Hospital of San Bernardino

(2002) 99 Cal.App.4th 1448

Hospitals Then

“...hospitals... provid[ed] minimal services to only the lowest classes of society. They were usually underfunded, dirty, crowded, and staffed by unpaid volunteer physicians... [the doctors would] literally ‘practice’ their skills on the poor.”

Hospitals Now

“...hospitals compete aggressively in providing the latest medical technology and the best facilities... they are run much like any large corporation... hospitals in the aggregate spend billions to advertise their facilities and services...”

Mejia... cont'd

"A hospital is generally deemed to have held itself out as the provider of care, unless it gave the patient contrary notice..."

"Reliance is established when the plaintiff looks to the hospital for services... In fact, many courts presume reliance... ostensible agency is readily inferred... the burden of proving ostensible agency... has been relaxed..."

"The doctors... are the hospital's instrumentalities... regardless of the private arrangements between the hospital and the physician... whether or not this perception [of being instrumentalities] is accurate... matters little..."

"All a patient needs to show is that he or she sought treatment at the hospital... [an] Oregon court explained that... proof of actual reliance... was inappropriate in the hospital context..."

BAJI 13.20.6 Ostensible Agency-Hospital and Physician (Spring 2017 New)

When a patient seeks to hold a hospital liable for the negligence of a physician under the doctrine of ostensible agency, the patient has to prove two elements: (1) conduct by the hospital that would cause a reasonable person to believe that the physician in question was an agent of the hospital, and (2) reliance on the apparent agency relationship by the plaintiff.

The first element is satisfied when the hospital holds itself out to the public as a provider of care, unless it gave the plaintiff patient contrary notice. In the emergency room context, contrary notice is insufficient when an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.

BAJI 13.20.6...cont'd

Reliance upon an apparent agency is demonstrated when the patient plaintiff looks to the hospital for services, rather than to an individual physician. The essential factual issue is whether the plaintiff had reason to know that the physician was not an agent of the hospital, such as when the patient is treated by his or her personal physician.

Communication with the Public

- Names
- Advertising
- Signs – ER
- Logos
- Forms

Legal relationship between hospital & physicians:

- Ostensible Agency language
 - Provides protection against respondeat superior
- Independent contractors
- Not employees of hospital
- Including ED, on-call specialists, hospitalists, intensivists, radiologists, pathologists, anesthesiologists
 - Assists to avoid allegations of ostensible agency
- Contracted Allied Health Professionals
 - Avoid allegations of ostensible agency

Conditions of Admissions Forms

LEGAL RELATIONSHIP BETWEEN HOSPITAL AND PHYSICIAN: All physicians and surgeons furnishing services to the patients, including the radiologist, pathologist, anesthesiologist and the like, are independent contractors with the patient and not employees or agents of the hospital. The patient is under the care and supervision of his/her attending physician and it is the responsibility of the hospital and its staff to carry out the instructions of such physician, as appropriate. It is the responsibility of the patient's physician or surgeon to obtain the patient's informed consent, when required, to medical or surgical treatment, special diagnostic or therapeutic procedures, or hospital services rendered for the patient under the general and special instruction of the physician.

Conditions of Admissions Forms

11. Legal Relationship Between Hospital and Physician(s): All physicians and surgeons providing services to me, including the radiologist, pathologist, emergency physician, anesthesiologist, physician assistants, nurse practitioners and others, are not employees or agents of the hospital. They have been granted the privilege of using the hospital for the care and treatment of their patients, but they are not employees or agents of the hospital. They are independent practitioners.

I understand that I am under the care and supervision of my attending physicians. The hospital and its nursing staff are responsible for carrying out my physician's instructions. My physician or surgeon is responsible for obtaining my informed consent, when required, to medical and surgical treatment, special diagnostic or therapeutic procedures, or hospital services provided to me under my physician's general and special instructions.

Patient Initials: _____

Conditions of Admissions Forms

the first time in history that the people of the United States have been asked to do this. The people of the United States have been asked to do this because they are asked to do it. The people of the United States have been asked to do this because they are asked to do it.

2. LEGAL RELATIONSHIP BETWEEN HOSPITAL AND PHYSICIAN

All Physicians and Surgeons furnishing services to the patient, including emergency doctor, on call specialists, radiologist, pathologists, anesthesiologist and the like, are independent medical practitioners with the patient and are not employees or agents of the hospital. Patients may also receive separate bills from the above mentioned independent practitioners or ambulance services.

✓ (Pt. In)

Initials 

The patient is under the care and supervision of his/her attending physician and it is the responsibility of the hospital and nursing staff to carry out the instructions of such physician. It is the responsibility of the patient's physician or surgeon to obtain the patient's informed consent, when required, for medical or surgical treatment, special diagnostic or therapeutic procedures, or the hospital services rendered the patient under the general and special instructions of the physician.

3. *Phytolacca acinosa* L. (Plants)

1992-93: The first year of the new curriculum was introduced.

Communication... cont'd

- Names
- XYZ Medical Center
- XYZ Primary Care Clinic
- XYZ Maternity Care Clinic
- HOSPITALIST – yikes!

CHANGE THE LAW

- California is an outlier
- Corporations may not practice medicine... they have no professional rights, power, or privileges. (§§2052, 2400)
- First duty to employer, or first duty to patient?

Financial Strategy

- The doctors might say “we like being ostensible agents – it provides us with excess coverage at no cost and it is consistent with our one big happy family approach.”
- **Consider increasing coverage limits**

Statutory Indemnity

An employee who commits a tort must indemnify the employer who pays the damages. (§2865)

Statutory Defense

The employer shall indemnify employee for all expenses related to work, and that includes a duty to defend and duty to reimburse settlement. (§2802)

Good Faith Settlement

I will settle around you – An idle threat

Consider Express Indemnity Clauses in Physician Contracts

- You indemnify us for any type of negligence.
- You indemnify us for passive negligence (omissions).
- You indemnify us for what we owe because of you.

Coverage Under the CHI Policy and the Group's Policy

- Get the current version of the policy
- Does it provide contractual indemnity coverage?
- Policy priority – whose policy pays first? What do the policies say? What do your contracts say?
- Additional insured endorsement

CONCLUSION

- Communication Approach
- Legislative Approach
- Financial Approach

Cases

*Stanhope v. Los Angeles College
of Chiropractic* (1942) 54 Cal.App.2d 141

Seneris v. Haas (1955) 45 Cal.2d 811

Quintal v. Laural Grove Hospital
(1964) 62 Cal.2d 154

Jacoves v. United Merchandising Corporation
(1992) 9 Cal.App.4th 88

*Mejia v. Community Hospital of San
Bernardino* (2002) 99 Cal.App.4th 1448

*Romar v. Fresno Community Hospital &
Medical Center* (E.D. Cal. 2007) 2007

WL 91182

Ermoian v. Desert Hospital (2007) 152

Cal.App.4th 475

Van Horn v. Hornbeak (E.D. Cal. 2010)

2010 WL 599885

Whitlow v. Rideout Memorial Hospital
(2015) 237 Cal.App.4th 631

Markow v. Rosner (2016) 3 Cal.App.5th 1027

*McCrosky v. Carson Tahoe Regional Medical
Center* (2017) 133 Nev.App.Op. 115

Statutes

Civil Code §§2295, 2298, 2299 & 2230

Labor Code §§2750, 2802, & 2865

Business & Professions Code §§2052 & 2400

Questions?