

The Risk Manager

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Vicarious Liability or, The Company You Keep

This title is not intended to refer to a good insurance company, although we think Galen is such a company, but to the well-documented phenomenon that lawsuits brought against medical practitioners almost invariably include a claim against every doctor and institution the plaintiff had any contact with in the course of seeking treatment. "Sue everybody and sort them out later" is a well-known tactic of the Plaintiff's bar.

If the patient suffers an unfortunate outcome, or for some other reason asserts that the standard of care has not been met, the fact that you were in the operating room, or read the x-rays, or made a diagnosis and referral, means you may find yourself undergoing inconvenience and embarrassment even though your conduct was above reproach.

Vicarious Liability

Vicarious liability is a rule of law that imposes responsibility on one person for the actions of another. Of course the risk that a court will impose such a responsibility is not confined to doctors. Bartenders who serve intoxicated patrons and people who don't supervise their pets effectively are frequently called upon to account for the acts of others when there has been an injury.

This subject was given a thorough examination when the laws and regulations defining the role of Physician's Assistants and Nurse Practitioners were drafted. Most practitioners know how the rules work in an office setting. If, for example, you sign an inappropriate prescription prepared by another, the fact that you were busy or tired will not provide a sufficient defense.

There are situations in which you can be held responsible for those working with you. Here are some ways to minimize that risk.

1. Document

The importance of making a contemporaneous record is basic. It can be overlooked, but its importance cannot be overstated in the context of a procedure that involves others. If you promptly dictate notes on what you did and on issues you observed your notes are much more likely to be accepted as an accurate record of what occurred, and you will be spared the chore of trying to remember details that can be forgotten or confused with issues in other matters as time passes.

One of the great problems with defending a claim as one of a group of defendants is that each party is tempted to point the finger of blame at the other defendants, creating a divide-and-conquer situation for the claimant. If there is confusion over who did what, and particularly over what you did, you are at risk that you may be held -- perhaps only partially -- responsible for an unhappy outcome. Even if claims against you are dismissed after a trial you will have spent time and money in your defense. A good contemporaneous record dispels such confusion and is a bulwark for a doctor in a multi-party situation.

2. Be Pro-Active

If, during a procedure, you have reservations about the performance of another participant you should not hesitate to attempt to resolve the issue then and there. Refraining from action if a patient is being endangered is unacceptable, and sorting things out in front of a jury later on is a high-risk, high emotion solution. *(Please turn over.)*

The operating room is certainly not a good place for an argument, which is why it is important to choose those with whom you associate carefully, but when the occasion arises, and you feel that an error is being made, you should speak up. Being silent will later put you on the defensive.

Special issues can arise if you assume the title of “Director”

3. Be Selective.

Another situation in which a practitioner can find himself or herself embarrassed or implicated by the actions of others is in the role of “Medical Director” of a nursing home or other facility. These positions may appear to offer an attractive extra source of income and a modicum of prestige but they can also bring a significant risk that the “director” will be charged with vicarious liability for the actions of the nursing staff and others.

If you do not plan to take an active role in supervising the activities of other caregivers at a facility where you have apparent authority you run the risk that the others will not meet the standard of care and that you will be charged with responsibility for their shortcomings because you are getting paid to “direct” the provision of care.

You would not perform an operation without having confidence in those assisting you. Don’t assume that because you work in an office rather than an operating room, your responsibility for those you supervise is less.

Summary

Just as you put your life in the hands of the pilot when you board a plane, you put some of your reputation on the line when you share in the treatment of the sick and injured with other health care providers.

Some of those you will work with are under your supervision. In that circumstance it is beyond question that you are responsible for making certain everyone meets the standard of care, and you are well-advised to choose a team you can rely on.

In other situations your control and the concomitant responsibility to the patient are not so clear, and your power to protect yourself may be more limited. Do not become paranoid. Much of modern medicine’s promise comes from fruitful collaborations.

All the same, you should be aware of the occasions and the degrees to which you are relying on others when you are, and take steps like those outlined to reduce the chance of becoming included in a group of defendants or being charged with vicarious liability.

By documenting what you do, remaining pro-active, and being selective as to the other medical providers you rely on, you may avoid the expense and embarrassment of defending against a claim that arises out of the actions (or omissions) of someone in whose company you found yourself.

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