



**Protecting Your Assets:  
What Physician Practice Groups Need to Know**  
Frank N. Luccia, JD

When a physician gets sued for malpractice, the physician's practice group is often sued as well. If the physician loses the lawsuit, and a judgment is entered in excess of the member physician's available insurance limits, plaintiffs look to the practice group to pay the excess judgment. There are two reasons why plaintiffs look to practice groups: First, Texas law makes it far easier to collect a judgment from a business entity than an individual. Second, the group has a large cash asset, namely its accounts receivable, which typically exceeds the liquid assets held by an individual physician. While insurance coverage protects practice groups to a great extent, simple changes in practice structure and management can help reduce risk to the group's assets.

**Direct and Derivative Liability Claims**

Direct liability claims assert the group itself was negligent. Derivative liability claims affirm that the group is legally responsible for the negligence of a group member.

**Direct Liability Claims**

While physician practice groups are defined by Texas law as health care providers, they are not licensed to practice medicine and are prohibited from doing so. Physician practice groups cannot be sued for negligently rendering care. However, like health care institutions, physician practice groups can be sued for direct liability claims, including: negligent hiring, retention and training; failure to maintain or enforce adequate policies and procedures; and failure to adequately maintain facilities or equipment used in office procedures.

While it is common for plaintiffs to allege some direct liability claim against the group, supporting expert reports are rarely produced and these claims are usually promptly dismissed. The claims that do survive are not direct, but derivative. The derivative claims are either called vicarious liability or joint and several liability. These claims are a potential source of significant exposure for physician practice groups.

**Vicarious Liability**

Employers of all kinds are vicariously liable for the negligence of their employees. If a jury finds that the employee of a physician practice group has committed malpractice and caused injury, the employer (the group) will be responsible for paying the judgment. Conversely, physician practice groups have no responsibility for the negligence of independent contractors. For this reason alone, physicians should never be employed by the group, but instead should be independent contractors. Additionally, there is a good argument that it is illegal for a practice group to employ a physician. An employer has the right to control the details of the employee's work. Only one who is licensed to practice medicine can direct the details of a physician's care. Since physician groups are not licensed, they are legally prohibited from entering into an employment agreement that gives them the right to direct physician care.

Despite these legal implications, some groups sign employment contracts with new member physicians. Additionally, groups frequently withhold taxes and provide benefits; additional factors viewed by courts as evidence that it was the intent of the parties to enter into an employment

relationship. The first time many consider the legal implications of an employment contract is after a member physician and the group has been sued. After being sued, there is often some temptation to argue that while an employment contract exists, it was not the intent of the group to “employ” the physician member. However, attempting to deny an employment relationship after being sued can create a conflict for both the group and the member physician. The group may want to disavow the employment contract to eliminate its exposure. However, the member physician may not want to relinquish the added protection provided by the group’s coverage and assets. An ounce of prevention is worth a pound of cure. Employment contracts should be replaced with independent contractor agreements for all physicians who are not shareholders or partners.

### **Joint and Several Liability**

Like vicarious liability, joint and several liability is wholly derivative. The claim does not state that the group did something wrong, but rather the group has to pay for someone else’s wrong. The Texas Legislature included joint and several liability when it created the legal entities most frequently used by physicians to organize their group practices. For example, Section 24 of the Professional Association Act provides in pertinent part that:

“The association, but not the individual members . . . , shall be jointly and severally liable with the officer or employee furnishing professional services for . . . professional errors, omissions, negligence, incompetence, or malfeasance . . . ”

This statute makes a professional association responsible to pay a verdict entered against any member who is an officer or employee. The Professional Corporation Act extends responsibility to verdicts against officers, employees and agents.

It is beyond the scope of this discussion to detail the pros and cons of the various legal structures available to physician practice groups and the strategies that can be employed within any given structure. Suffice it to say that organizational strategies do exist that minimize the group’s exposure but these are best explored prior to litigation.

Frank Luccia is a 1986 graduate of the University of Houston Law Center and a partner in the Houston firm, Luccia & Evans, L.L.P. The firm specializes in the legal needs of health care providers and medical device manufacturers. Questions about the subjects addressed in this article can be sent to Mr. Luccia at [fnluccia@luccia-evans.com](mailto:fnluccia@luccia-evans.com).