

Vicarious Liability and Contracts

What's the Risk?

Under the legal doctrine of respondeat superior, you may be found vicariously liable for the actions of a physician, nurse, advanced practice professional (APP), physical therapist, medical technician and assistant, secretary, and other support staff members you directly supervise. This can also extend to supervision of medical residents, students, and fellows. Without systems that address responsibilities and what is expected of staff members and students, a practice may find itself embroiled in situations that could potentially lead to claims and losses. Claims can be related to a lack of supervision, inadequate education, and/or training, skills, technique, or practicing beyond scope. Supervisory issues involving APPs often stem from poor clinical judgement. Poor supervision of APPs and staff members can also lead to medication-related claims.

Under the theory of ostensible agency, you may be found liable for the acts and/or omissions of professional or support staff members who appear to be your employee or to act on your behalf, if a patient interacting with them reasonably believes that they were acting as your employee or agent. This type of liability typically poses more of a threat if you utilize or share space with independent contractors. It can arise from such simple acts as allowing these individuals to wear lab coats with your office or corporate logo or letting them write patient instructions on notepads with your practice's name or logo. Any medical or business relationship has the potential for creating additional liability exposure.

To minimize liability, practitioners or practices may utilize a contract. However, entering into a contractual agreement without adequate legal care represents a significant risk to the practice, and perhaps, the individual. Others may not recognize the significance of these relationships and fail to draw up a contract. In the absence of a written contract specifying the details of a business arrangement, there is a significant risk that misunderstanding might lead to liability.

When Is This Risk an Issue?

A practitioner can be held vicariously liable for the professional actions of those individuals whose work the practitioner in some way controls, such as professional staff members, unlicensed healthcare personnel, and support staff members. Some of these specific relationships include APPs, nursing staff, support staff, unlicensed assistive personnel, or employed and independent contractors.

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Advanced Practice Professionals

A physician who supervises or collaborates with an APP may be held vicariously liable for the APP's alleged negligence if it resulted from protocols the physician and APP jointly signed.

A physician who does not collaborate with or supervise the APP may be held vicariously liable for their alleged negligence if the APP acted at the physician's direct order or recommendation.

For additional information, please see the chapter [Advanced Practice Professionals](#).

Staff Members

A practitioner can be held vicariously liable for the professional actions of those individuals whose work is in some way controlled by the practitioner, such as professional staff members, unlicensed healthcare personnel, and support staff members. Practitioners may be held liable for support staff members and unlicensed personnel who provide intentional or inadvertent medical advice, breach confidentiality, act beyond the scope of their role, or dismiss a patient's symptoms and/or fail to communicate symptoms to the practitioner, thereby delaying treatment.

Support staff and unlicensed assistive personnel play a crucial role in practice operations. It may be tempting to delegate beyond the scope of their limited training and qualifications, especially when a staff member has years of experience at the practice. Examples of this include an unlicensed staff member telephoning prescriptions to a pharmacy or performing procedures typically conducted by licensed personnel.

Several *Physician Practice Risk Management Manual* chapters have recommendations to minimize these risks. For recommendations regarding written job descriptions addressing the scope of responsibility for all persons working in the office, see [Practice Management: Managing Office Staff](#). For telephone and medication-specific recommendations related to support staff and unlicensed health personnel, see [Communication: Telephone](#) and [Medication: Safety](#). For recommendations to minimize the risk of a confidentiality breach, see [HIPAA Privacy](#).

Employed and Independent Contractor Practitioners

A practice or practitioner may incur liability under the doctrine of vicarious liability if they employ another practitioner. A practitioner may also incur liability under the legal theory of ostensible agency if they contract with a practitioner to provide services, such as a moonlighting or locum tenens coverage, or simply share office space with them; a patient might reasonably believe the contracted practitioner is the practitioner's agent. A formal written agreement that delineates the relationship, respective roles, and responsibilities can eliminate ambiguity.

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If litigation ensues, a court will decide the issue of vicarious liability and whether an injury or damage resulted from the act of a provider's employee. When litigation arises that involves an independent practitioner, the court will look at two factors: whether the injured patient could reasonably believe that the independent practitioner was acting as the provider's agent, and whether the provider controlled the independent practitioner's practice.

Corporations and Partnerships

The professional corporation and partners of the corporation that employ a practitioner may be held vicariously liable for the practitioner's actions. Having a certification, monitoring, and competency process in place may help the practice defend an adverse outcome resulting from the actions of such an individual. Additionally, credentialing/recredentialing ensures that employees are qualified to perform their assigned duties. For more information, see the [Credentialing](#) chapter.

Practitioners and practices enter into business relationships for services, products, or office space with a number of entities and individuals that may include, but are not limited to, healthcare facilities, accountable care organizations, medical homes, laboratories, hazardous waste management companies, suppliers, vendors, pharmaceutical companies, and physicians or other healthcare professionals. Some of these relationships have well-defined boundaries, while others are ambiguous. Defining business relationships using a contract eliminates ambiguity.

How Can I Reduce Risk?

A physician can take many steps to reduce the risk of vicarious liability and ostensible agency, including supervising support staff members, unlicensed assistive personnel, and APPs; drafting formal agreements/contracts with employed physicians, independent practitioners, or contractors who share office space, supplies, and/or equipment; and creating a legal entity that accurately represents and protects the interests of the provider's practice. Specific risk management recommendations for these steps follow.

Supervise Staff Members and Students

Define scope of responsibility for office staff

- Develop written job descriptions addressing the scope of responsibility for all persons working in the office. For more information, see [Practice Management: Managing Office Staff](#).

Supervise students, residents, and fellows

- Ensure faculty supervision of medical training programs.

Supervise Staff Members and Students

Develop protocols for nurse-only visits

- Consider assessing supervisory risk by utilizing the [Faculty Supervision of Medical Training Programs – A Checklist to Manage the Risk](#) tool.
- Develop and implement written protocols for nurse-only visits. Ensure that the written protocols address the following:
 - Permissible types of nurse-only visits (e.g., blood pressure check).
 - Designated questions based on the visit type (e.g., asking about current medications for a blood pressure check, about allergies if giving an injection, and about any new problems for other visits).
 - Criteria for having a physician assess the patient (e.g., variation in the protocol, patient presents with an additional problem).
 - Situations or circumstances the nurse needs to communicate to the practitioner (e.g., no physician order).
 - Documentation required by the nurse.
 - Process for timely practitioner review and plan for follow-up.
 - Mechanism to ensure that nurse-only visit activities fall within the scope of practice for a licensed nurse. Consider using a flow sheet or algorithm to determine necessary physician involvement.

Verify competencies

- Verify the competency of licensed and unlicensed personnel who perform procedures (e.g., phlebotomy, electrocardiograms, and pulmonary function tests) or are responsible for infection prevention activities (e.g., reprocessing patient equipment, safe injection practices, cleaning exam rooms).
- Develop a written protocol for demonstrating competency (e.g., didactic, hands on, education by vendor).
- Document skill validation annually and maintain a documentation copy in the employee's personnel file.

Supervise Staff Members and Students

- Refrain from delegating tasks for which staff members have no training, or are outside their scope of practice.
 - Monitor all employees' compliance with office practice standards and protocols.
- Follow state laws**
- Follow state regulations regarding the scope of practice for licensed personnel, as well as available guidance on unlicensed personnel.
- Monitor compliance**
- Monitor each employee's compliance with the office's practice standards and protocols.

Establish Formal Business Agreements/Contracts

- Seek legal advice**
- Seek an attorney's advice in drafting or reviewing any contracts to which practitioners are a party.
- Establish formal agreements with employed physicians and APPs**
- Draft written agreements with all employed physicians and APPs that clearly address the roles and responsibilities of all parties, as well as the required level of supervision.
 - For additional information on written agreements with APPs, see the chapter [Advanced Practice Professionals](#).
- Negotiate before signing**
- Discuss the following issues, if applicable, prior to signing the contract:
 - Compensation and incentive bonus.
 - Goals and timeline for advancement.
 - On-call policy of the practice.
 - Location of services, travel requirements, and reimbursement, if the practice has multiple offices.
 - Professional responsibilities.
 - Time requirements for both clinical and administrative duties.
 - Benefits, vacation, and disability/maternity leave.
 - Nonspecific termination with cause.
 - Restrictive covenants.
 - Billing procedures.

Establish Formal Business Agreements/Contracts

- Who will obtain insurance coverage and the required limits.
- Nonsolicitation and noncompete clauses.
- Termination terms.
- Hold harmless clauses.
- Definitions and remedies for a breach.
- The applicable state law to a potential dispute.

Formalize Rental Agreements

- Consult with legal counsel to establish a written contract for shared space. If you rent space to another practitioner, practice, or entity, formalize the arrangement with a written contract.
- Ensure that the contract addresses the sharing and/or use of office space, equipment, and staff members.
- Avoid the appearance that the various practitioners and/or clinical service providers who share space are employees of the same practice. Do not allow practitioners or clinical service providers who share space in the practice to:
 - Wear name badges or other forms of identification using the practice's name or logo.
 - Use the practice's stationery or business cards.
 - Be listed with other members of the practice on any signs, rosters, or telephone listings.
- Consider having separate check-in windows and separate staff members to clearly delineate the practices.
- Post a sign in the waiting area or other patient care areas informing patients that two nonaffiliated entities are sharing space but have no other professional connection with each other.

Draw Up Contracts With Service Providers

Develop contracts with service providers

- Have written contracts with nonmedical service providers or groups, such as cleaning, maintenance, lawn care, and gardening. Include any applicable requirements from the "Negotiate Before Signing" section above.

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Draw Up Contracts With Service Providers

Establish contracts with laboratories

- Ensure that the contract addresses the following:
 - Responsibility for damage to practice, patient, or visitor property.
 - Service interruption management.
 - Acceptable service or product substitutions.
- Insurance requirements (including limits) for property damage and workers' compensation.
- Have a written contract between the practice and any routinely used outside laboratories. Ensure that the contract details the following:
 - How, when, why, and by whom specimens will be picked-up.
 - How normal and abnormal test results will be communicated.
 - Responsibility for secure electronic transmission of results and maintenance/replacement of equipment used for electronic transmission.
 - Turnaround times for both routine and stat tests.
 - Protocol for managing emergency or off-hour requests.
 - Billing procedures.
 - Any other information needed by either or both parties.

Ensure Timely Review and Safe Retention of Practice Contracts

Develop contract review guidelines

- Develop a contract review calendar to ensure that contracts are reviewed well in advance of the renewal period and to avoid inadvertent automatic renewal.
- Prior to renewing any contract, obtain guidance on new regulations or standards that may impact the contract terms.
- Develop guidelines that address who may review, sign, and/or renew contracts; the required review levels; and which contracts require legal review.

Develop a contract retention process

- Develop guidelines for filing and retaining contracts. Consider developing a contract log.

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Ensure Timely Review and Safe Retention of Practice Contracts

- Retain original contracts, exhibits, and addendums in a secure, easily accessible fire- and waterproof location.
- Retain contact information for all parties to the contract, attorneys, and other professionals who drafted and/or reviewed the contract, either with the original contract or in a contract log.

Use Caution With Corporations and Partnerships

Carry same limits

- Ensure that each partner carries limits of liability appropriate to their practice, as recommended by the medical professional liability carrier.

Carry practice policy

- Ensure that the practice has a medical professional liability insurance policy with limits of liability recommended by the carrier.

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