

Advertising Re-emerges as a Significant Risk Exposure for Healthcare Organizations

In the 1990s, the legal doctrine of apparent agency, which had been previously applied in the hospital setting, was used to impose liability on managed care organizations for the acts of independently contracted as well as employed practitioners. Recent case law has expanded that doctrine in the context of advertising materials so that various types of healthcare organizations — hospitals, nursing homes, and others — may become accountable for the acts of their healthcare professionals based upon information contained in advertising materials.

Risk exposures based upon a hospital's marketing and advertising have become more explicit following a recent decision by the First District Appellate Court of Illinois in *McCorry v. Evangelical Hospitals Corp.*, 331 Ill.App 3d 668, 771 N.E.2d 1067 (1st Dist. 2002). The Court applied the doctrine of apparent agency to hold the hospital liable for the medical negligence of its employees. The finding was based upon the hospital's advertising materials regarding its services and staff.

Background – *McCorry v. Evangelical Hospitals Corp.*

In June 1994, Richard McCorry was admitted to Christ Hospital by his personal physician, Dr. Kazaniwskyj for neurosurgery. CNS Neurological Surgery provided neurosurgery services at the hospital. A CNS neurosurgeon and member of the Christ Hospital medical staff, Dr. Hurley, performed surgery on the plaintiff.

After Dr. Hurley performed surgery on Mr. McCorry, Mr. McCorry was found to be paralyzed. Mr. McCorry subsequently sued Christ Hospital, alleging vicarious liability for the negligent act of its apparent agent, Dr. Hurley. As evidence of the apparent agency, the plaintiff submitted



the hospital's advertising literature that refers to its "highly qualified physicians" and to "our physicians" to assert that an independent contractor staff physician acted as an agent of the hospital. Mr. McCorry did not allege that Dr. Hurley was an employee of the hospital.

Legal issues reviewed in Appellate Court decisions

The appellate court examines whether or not the physician acted as an apparent agent of the hospital. Plaintiff McCorry presented evidence corresponding to the elements of apparent agency:

1. The hospital advertisement stated that its staff includes "highly qualified physicians," making it a desirable place to receive medical care. Moreover, CNS maintained an office on hospital grounds, in a building connected to the hospital.
2. The hospital did not present evidence in the informed consent document to show that it informed Mr. McCorry that its staff physicians may be independent contractors, rather than employed physicians/agents of the institution.
3. It appeared from the language "our physicians" in the advertisements, that the hospital had responsibility for the quality of services provided by the physicians.

Doctrine of apparent agency

The doctrine of apparent agency refers to the concept that an entity, such as Christ Hospital, may be held liable for the negligent acts of a non-employed practitioner if the facility creates an appearance that the independent contractor is an employee, and the patient reasonably believes and detrimentally relies on the appearance of that authority. Under the facts of *McCorry*, Christ Hospital was found to have granted the apparent authority to the extent that the plaintiff relied in part on the hospital when he accepted treatment from Dr. Hurley. In addition, the hospital literature could have led a reasonable person to conclude that it accepted responsibility for its choice of physicians to provide the advertised health care.

Strategies for reducing risk exposures relating to the doctrine of apparent agency

The risk exposures highlighted in this case focus on advertising and marketing strategies and the informed consent document. It is important to assess and continually update all your documents to eliminate exposures relating to the doctrine of apparent agency.

Steps to take include, but are not limited to:

- Review and revise all marketing materials, informed consent forms and other documents to ensure they do not contain any language that may imply that contracted members of the medical staff or other contracted providers are agents of the organization.

continued

- Review and revise marketing materials and other documents to eliminate the use of possessive language or statements regarding the staff or contracted providers. Statements such as “our physical therapists” or “Eastern View staff” support the belief that the facility or agency and staff are one organization.
- Review and revise marketing materials and other documents that contain descriptions of services provided to ensure the descriptions are accurate and

do not contain statements that may be misleading.

- Revise consent to treatment forms, refusal of treatment forms and other documents to include a disclaimer informing patients that contracted members of the staff are independent contractors and not agents or employees of the organization.
- Obtain legal counsel review of all marketing materials and other documents prior to publication.

HPSO Meets an Expanding Practice Need Through a Fitness Service

We understand that as a business owner you want to have the flexibility to grow your business by expanding the services you offer. HPSO and CNA provide you with a solution to your professional rehabilitative and aftercare services. We are pleased to announce a solution should you offer fitness services, services typically offered by fitness centers.

comes with increased ‘public’ traffic into and out of your physical location.

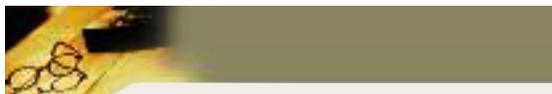
As before, personal trainers, athletic trainers, health educators, kinesiologists/kinesiotherapists, sports medicine instructors and others were included in your policy coverage in the context of delivering a care plan for rehabilitative services. That will continue and should you choose to expand the services offered by these staff members (employee or independent contractor) to include strength training or group exercise classes or both, let us know so that we can make certain you are properly insured for these expanded services. By contacting HPSO, we can discuss eligibility of the fitness services your facility offers or may soon offer.

HPSO can consider the following certified fitness professionals as part of your policy coverage:

- strength and conditioning specialists;
- clinical exercise specialists;
- lifestyle and weight management consultants;
- swimming/tennis/golf instructors;
- yoga/pilates instructors;
- group fitness/aerobic instructors;
- or, exercise physiologists

Expansion has its rewards, but as a business owner, you also need to consider the risks that these changes can present. If you are thinking about expanding your practice by offering services that are not rehabilitative, please contact HPSO by e-mail at firms@hpso.com or call us at 1-888-288-3534 so that we can help you evaluate your exposure, add the Fitness Services Liability Endorsement and General Liability where appropriate and if necessary, recommend other suitable coverage for your expanded services.

What does that mean to you? HPSO and CNA developed an endorsement that can be added to your policy which expands the coverage to include incidents related to physical fitness, including but not necessarily limited to services or advice associated with diet, cardio-vascular fitness, body building or physical training programs that are not part of a prescribed therapy plan. We also will add general liability coverage to your policy so that you are properly protected for the liability that



General Liability Insurance

Is general liability insurance necessary for your healthcare practice? Whether you treat a patient or client, conduct professional consulting services, or have members of the public enter your practice for other reasons, general liability insurance can protect you. While your professional liability insurance policy protects you for medical incidents, a general liability insurance policy covers accidents that result in bodily injury or property damage in the workplace—whether that workplace is your office, a facility where you provide services, or a patient’s home—that did not arise from the therapeutic relationship between you and a patient or client. These injuries or damages can happen to a patient or client, to family members that come in with the patient or client, vendors you do business with, delivery people, or any visitor to your practice.

Let’s say a patient or client is on your premises and bumps into a piece of equipment while leaving your office and is hurt. Or, she trips over a loose rug and breaks her ankle. General liability coverage could respond, subject to the limits of liability, in circumstances when a claim or lawsuit is filed alleging bodily injury.

The same principle would apply if you or an employee breaks or damages something belonging to a patient or client, or the space you lease for your practice experiences an electrical fire caused by your faulty equipment. Perhaps one of your employees is providing home care and he causes damage to a valuable oriental rug. Your general liability coverage is intended to respond to property damage and associated legal costs in a resulting claim or lawsuit, subject to applicable limits of liability.

Knowing where the risks lie is beneficial. Preventing them, however, is the first and most crucial step to reduce injury or damage for everyone. Make it a routine to look at your place of business for hazards and correct them immediately. Remember, as the old adage goes, “an ounce of prevention is worth a pound of cure.”

For more information on preventing slips, trips and falls, please go to www.hpso.com/slips to read *KEEPING YOUR CUSTOMERS SAFE: CONTROLLING SLIPS, TRIPS, AND FALLS*, and view a risk management checklist from CNA, the underwriter of your policy.

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N-6252-408