

Legal Issues and Professional Liability Insurance: Some Fundamentals for the Practicing Physician

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- * 1. These remarks are not intended to constitute legal advice. The substance and rules of law vary by forum whether state or federal. If you have questions please seek the advice of an attorney familiar with your particular jurisdiction.
- * 2. This author does perform consulting work and is currently an insured with the program under discussion.
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Source Citations

- * For the ease and convenience of the membership interested in this talk the citations are generally to non-technical references such as Wikipedia.
- * There are some case citations from reported state Supreme Court decisions which are used solely for the purpose of illustration.
- * Please bear in mind that Wikipedia is (basically) free. If you have a legal issue or want competent advice, consult a licensed attorney.



Why Me??



Who Are The Parties To A Lawsuit?

• Who gets named as a Defendant in a lawsuit, and why, are two of the great mysteries of litigation to the general public.

• The individuals and business entities who must be named and served with process are governed by some variation of the Federal Rules of Civil Procedure. In particular, FRCP Rule 17, 18 and 19.



An Example:

• Alyce Murphy and Bill Murphy, Plaintiffs

• vs.

• Dr. Frederick Wood, III; Dr. S. J. Kassis, and Joe Dokes I Through V., the Cassia Memorial Tumor Board, John Does I Through XXX, the Cassia Memorial Hospital and Medical Center, Intermountain Health Care Services, Inc., and ABC Corporation, Defendants



What's Going On?

- 1. Obviously the plaintiffs' lawyer is taking a "shotgun" approach to naming Defendants, right? The question you should ask is why? Does the lawyer have personality issues, or is there a legal basis for doing this.
- 2. What is the purpose of Joe Dokes I through V?
- 3. What is the purpose of John Does I through XXX?



FRCP Rule 17

• Rule 17 states that all actions must be prosecuted in the name of the real party in interest, that is, the plaintiff must be person or entity whose rights are at issue in the case.

- Source:
- [wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure#Title_IV_-_E2.80.93_Parties](https://www.wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure#Title_IV_-_E2.80.93_Parties)



Why Is That Important?

- Pediatric cases – we will return to this category when we look at Statutes of Limitations and Tolling
- Subrogation
- Indemnity



FRCP Rule 18

• Rule 18 – Joinder of Claims and Remedies – states that a plaintiff who may plead in a single civil action as many claims as the plaintiff has against a defendant, even if the claims are not related, and may request any remedy to which the law entitles the plaintiff. Of course, each claim must have its own basis for jurisdiction in the court in which it is brought or be subject to dismissal.

• Source:
• wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure#Title_IV_22.80-93_Parties



FRCP Rule 19

• Rule 19 – Compulsory Joinder of Parties – if a person who is not a party to the suit is “necessary” to just adjudication of the action, under the criteria set forth in subsection (a), then upon motion of any party that person shall be made a party, served with suit, and required to participate in the action. **If the person cannot be made a party for any reason, such as lack of jurisdiction, inability to be located, etc., then the court uses the criteria in subsection (b) to determine if the absent party is “indispensable”. If so, the action must be dismissed.**

• Source:
• wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure#Title_IV_22.80-93_Parties



Indispensable Party

• 1. The answer to the questions posed earlier is that the plaintiffs’ attorney is trying to avoid having the case dismissed because he or she forgot to name an indispensable party.

• 2. A follow-up question to ask would be how does a member of the treatment team become “unavailable” because of a lack of jurisdiction?



Statutes of Limitation

- The purpose and effect of statutes of limitations are to protect defendants.
- 1. A plaintiff with a valid cause of action should pursue it with reasonable diligence.
- 2. By the time a stale claim is litigated, a defendant might have lost evidence necessary to disprove the claim.
- 3. Litigation of a long-dormant claim may result in more cruelty than justice.

▪ Source:
▪ https://en.wikipedia.org/wiki/Statute_of_limitations



Tolling the Statute of Limitations

- Pediatric cases – whose cause of action is it? Mom/Dad or the child's? Comes back to Rule 17 – who is the plaintiff and what can be claimed for damage.
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- Fraudulent Concealment
 - Discovery and the Reasonable Man Standard
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▪ Source:
▪ https://en.wikipedia.org/wiki/Statute_of_limitations



Why Is That Important?

- Example: Suppose the patient was a 5 year old male and some error was made by some team member which resulted in a severe injury to the child. Suppose further that the statute of limitations in the state for professional medical related injuries is 2 years.
- Question: When does the statute of limitations run out and bar any litigation for that injury -- 2 years from the date of the accident, or longer?



Respondeat Superior

▪ **Respondeat superior** ([Latin](#): "let the master answer"; plural: *respondeant superiores*) is a doctrine that a party is responsible for (has [vicarious liability](#) for) acts of their agents.^{[1]:794} For example, in the United States, there are circumstances when an [employer](#) is liable for acts of employees performed within the course of their employment.^[2] This rule is also called the **master-servant rule**, recognized in both [common law](#) and [civil law](#) jurisdictions.

▪ Source:
▪ https://en.wikipedia.org/wiki/Respondeat_superior

Professional Situations

- 1. Employer – Employee
 - 2. Independent Contractor (Locums or Consultant)
- It's the SCOPE of practice that counts.
- Outside the scope of the agency granted or employment agreement assigned responsibilities the master coverage is not available.

Some Factors Determining Coverage

- Was the act committed within the time and space limits of the agency?
- Was the offense incidental to, or of the same general nature as, the responsibilities the agent is authorized to perform?
- Was the agent motivated to any degree to benefit the principal by committing the act?

▪ Source:
▪ https://en.wikipedia.org/wiki/Respondeat_superior

A Few More Reasons to Have An Attorney

- 1. Cross Claims – one of the named defendants could file a cross-claim against you. Or maybe there’s a basis for you to cross claim against one or more of your co-defendants.
- 2. Counterclaims – is there some reason that the plaintiff(s) may have been at fault, or is there a joinder issue which needs to be addressed?
- 3. Third party practice – is there a vendor, or some other entity not already named which needs to be part of the case?
- 4. What do you do if one of the parties “tenders the defense” to you?



A Few More Reasons.....

- 5. How do you respond if YOUR insurance carrier denies coverage because your act was outside the scope of your employment/contract?
- 6. How do you respond if YOUR employer alleges your act was outside the scope of your employment or contract?
- 7. How do you respond if YOUR insurance carrier denies coverage because you failed to give notice within the contract time allotted of the possible existence of a claim?
- 8. How do you respond to the Plaintiff(S) if the claim is in excess of the policy maximum in your insurance contract?
- 9. How do you respond to YOUR insurance carrier if you have an excess claim situation – in other words how do you protect yourself?



Bottom Line

Personal injury lawsuits are not simply an exercise in determining whose fault it was, who gets to pay and how much.

Even a simple case can get very complex very fast.





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