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A GUIDE TO OSTENSIBLE PARTNERSHIP from MIEC

In considering potential sources of liability, a physician must be aware of the dangers presented by the doctrine of ostensible partnership.

The process of entering into a partnership usually involves an oral or written agreement defining the rights, duties and liabilities of the partners. A partnership can even be formed in the absence of such an agreement, where the intent of the parties, as shown by their acts and declarations, reveals that they are operating as a partnership and are doing so intentionally. Most physicians probably know that if they enter into a partnership, they can be held liable for the negligence or misconduct of one of their partners.

The doctrine of ostensible partnership is one step further removed from the above examples. Under the doctrine of ostensible partnership, individuals who do not intend to be partners and do not believe themselves to be partners can be held liable for one another as partners if, by their conduct, they cause third parties to believe that they are a partnership.

California Corporations Code § 15016 states: *When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made ...*

The question of whether the conduct of parties has created an ostensible partnership is one for a trial court to determine from the evidence. The evidence must be factually and legally sufficient to lead another person to believe that the physician is a partner and has assumed responsibility as such. The conduct which most obviously raises the danger of ostensible partnership is to refer to another physician, either verbally or in writing, as your partner. There are certain practices among physicians who share office space which may also lead to the danger of ostensible partnership. Such practices include: sharing office personnel, using the same letterhead, billing on the same letterhead, covering for each other, seeing each other's patients more than on just an emergency basis, and placing both names on the door without an indication that they are not in partnership.

In order to minimize the risk of being held liable as an ostensible partner, a physician who shares office space with other physicians should have separate employees when practical, pay his or her own bills separately, use a personal letterhead, charge patients of other physicians separately when covering for them, avoid regularly seeing other physicians' patients (except on an emergency basis), and should arrange for his or her own business needs separately - i.e., rent, accountant, insurance, etc.

Since liability as an ostensible partner is based on the patient's misunderstanding of the relationship among the independent physicians, physicians sharing office should consider asking each patient to sign a brief statement clarifying the relationship that reads as follows: 'The physicians in this office are not partners or otherwise affiliated in the same medical practice. They are all independent practitioners and simply share office space, equipment, and some staff in their separate practices. They are not responsible for each others practices or patients.'

It must be remembered that each case will be decided on its own facts, and the above areas of concern and suggestions are not intended to be all inclusive.

Individual policies do not insure doctors for liability they may have under the legal doctrines of "ostensible partnership" or "ostensible agency." Physicians who wish to carry insurance for such liability should contact MIEC's Underwriting Department – (800) 227-4527.

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LIABILITY CONSIDERATIONS FOR ASSOCIATIONS OF "SOLE PRACTITIONERS"

"Ostensible Agency"

Physicians who share a common reception area often wonder whether they may face liability for the activities of their "roommates" despite the fact that, with the exception of the common waiting room, the practices of the physicians are entirely separate.

There is a theory of law, "ostensible agency," which may apply in this situation. Basically, that theory holds that where one creates the appearance of agency relationship, it is only fair that that person be held accountable as though that agency relationship in fact exists. The rationale is two-fold. The first basis is "unjust enrichment": if you do additional business as a result of creating the impression that you are a larger enterprise, you would be "unjustly enriched" if you did not have to face the attendant increase in liability exposure for that larger enterprise. The second basis is "reasonable reliance": it would be unfair to defeat the reasonable expectation of a person who does business with an enterprise which appears to be of a certain size that the assets of that entire enterprise will be available to satisfy a judgment.

It is impossible to say with certainty whether a jury will find that the appearance of agency has been created in any particular case. The basic questions for the physicians involved is to what extent a reasonable patient would believe that they are practicing together. The fact that they share a common waiting room certainly suggests they are practicing together. On the other hand, separate registration windows, separate letterhead, separate billing statements, etc. would all suggest separate practices. It should be stressed that the issue is appearances.

Physicians involved in or considering practice arrangements of this sort should consult with their professional liability carriers and comply with the carriers' recommendations. If a carrier believes that additional steps should be taken to reduce the likelihood that an ostensible agency relationship will be found, the carrier will be in a position to make specific recommendations concerning how that goal may be accomplished. All of the physicians involved in this arrangement should be concerned about the potential liability implications.

Sometimes this question is raised as a result of the unstated concern that one or more of the physicians involved in this arrangement may have reservations with the capabilities of the other physician(s). Clearly, one method of reducing the risk of professional liability is to increase the quality of care. Physicians do the public and each other a favor by voicing their suggestions for improvement to each other on an ongoing basis. Should informal discussion be unavailing, both medical staff and medical societies provide peer review mechanisms which may prove helpful.