

# Advisor

THE TEXAS



PHYSICIAN'S ADVOCATE

## Protecting Your Assets: What Physician Practice Groups Need to Know

Written by Frank N. Luccia, JD

**W**hen 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 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.**

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

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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:

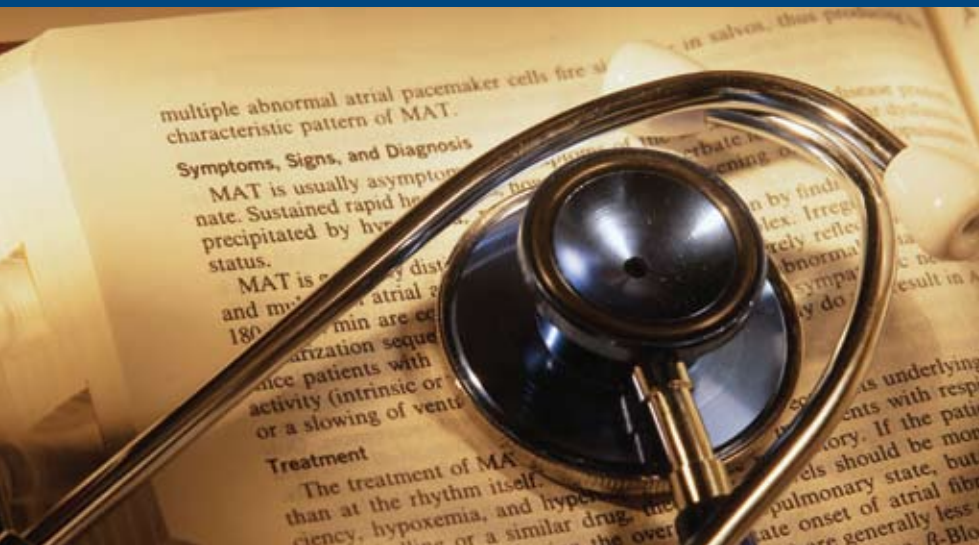
"The association, but not the individual members . . . , shall be jointly and severally liable with the officer or employee furnishing professional services for . . . professional errors, omissions, negligence, incompetence, or malfeasance . . ."

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 may be sent to Mr. Luccia at [fnluccia@luccia-evans.com](mailto:fnluccia@luccia-evans.com). ★*





## Accredited Continuing Medical Education Courses

Advocate, MD believes in providing the tools necessary for its insureds to be proactive and stay abreast of the many risk management and medical practice related issues that are so important to preventing and reducing claims, while helping to improve practice quality.

Physicians have access to hundreds of hours of accredited, continuing medical education courses on the Advocate, MD website. This user friendly website is available 24/7.

Each course is clearly outlined with the number of credits given for the course, costs associated with the course (if any) and the number of hours needed to complete the course and take the test.

Contemporary content makes the web based system easy to access and use. It gives physicians an alternative to “live” presentations, allowing them to avoid travel by using a comprehensive and useful tool that meets both CEU and CME licensure requirements.

To access Advocate, MD courses, go to either [www.advocatemd.com](http://www.advocatemd.com) or [www.advocatedo.com](http://www.advocatedo.com) and click on the “Physicians” section. Once in the Physicians section select “Risk Management” from the left hand box, and then select “Accredited CME Courses.”

Physicians may choose the course they need, take the course, and then take an exam covering the course content. The exam is graded and scored, and if a passing grade is achieved, the physician will receive a written certificate by mail.

For questions or help, please contact our Risk Management Department at **512.275.1836** or by email at [risk.management@advocatemd.com](mailto:risk.management@advocatemd.com). ★

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### NEED ANSWERS?

Please let us know if you have questions that you would like addressed in our next issue of the Advocate, MD Advisor or if you have suggestions for future topics.

If you are interested in submitting an article, testimonial, story or suggestion, please email us at [marketing@advocatemd.com](mailto:marketing@advocatemd.com). We have an experienced and knowledgeable staff ready to answer your questions and exceed your needs.

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# CASE STUDY: A physician cannot hide behind the fact that he was only “on call.”

By Brenda L. Freeman, JD

## Overview of Facts:

A 31-year old male visited the ER on several occasions within a two week span of time. On the first ER visit he was admitted to the hospital and diagnosed with intracranial bleeding and uncontrolled hypertension. The patient was released from the hospital after six days. The patient went back to the ER complaining of left leg pain, stating that he was just released from the hospital two days prior for a stroke and had some residual hemiparesis in his left leg. The patient was discharged the same day with a prescription for Demerol for the leg pain. The patient returned to the ER every day for the next three days complaining of left leg and back pain. Ultrasonography of the lower extremities was normal. He stated that the pain medication was not helping. On the third ER visit the patient was readmitted to the hospital by his treating physician for additional testing. This time ultrasonography showed deep vein thrombosis.

On the final admission, the admitting physician indicated his plan was to admit the patient for pain control, hydration and cardiology consult. He “planned to discuss the possibility of thrombolysis or heparin administration with a consulting physician.” Due to complaints of shortness of breath, a CT scan of the thorax was ordered stat at 10 a.m. The CT scan was not completed until after 3 p.m. The CT scan of the thorax documented multiple pulmonary emboli.

The on call physician was contacted at 6:30 p.m. and informed of the CT thorax results. He gave orders to transfer the patient to ICU

and to consult a neurologist to see if anticoagulation therapy was possible in light of the patient’s previous stroke. At 9:30 p.m. the on call physician called back and gave additional orders including the administration of Lovenox, if approved by the neurologist. Orders were also given to obtain a signed consent for a placement of an IVC filter the following morning. The neurologist ordered a stat CT of the brain, and if it showed no new bleeding, anticoagulation was approved. At 11:30 p.m. the on call physician was contacted and advised the CT indicated no new bleeding, only an old hematoma. The on call physician was also advised that the patient refused to take Lovenox “given his past history of cerebral bleeds.” No further action was taken by the on call physician. The patient began experiencing cardiopulmonary arrest and coded at 1:30 a.m.

## Lawsuit Filed:

A lawsuit was filed naming as defendants the Hospital and the on call physician. The primary allegations against the hospital related to the delay in performing the CT scan of the thorax as well as the delay in contacting the physician with the CT results.

## The Allegations Against the On Call Physician Were:

1. Failure to provide timely medical care and treatment to Decedent when he knew the Decedent had deep vein thrombosis and pulmonary emboli.
2. Failure to order a blood thinner to prevent further blood clot formation.

3. Asking the hospital staff by phone to obtain consent for the insertion of an inferior vena cava filter instead of timely inserting the filter.
4. Failing to see the Decedent in person, but instead advising hospital staff by telephone of the actions to be taken when he knew the Decedent had deep vein thrombosis and pulmonary emboli and knew (or should have known) that the Decedent's condition required immediate medical care and treatment.

#### **Liability Concerns:**

Plaintiff's experts were critical of the on call physician. He did not visit the Decedent when called by the hospital but rather issued verbal orders over the telephone. Both Plaintiff's and defense experts were of the opinion that once the on call physician received a telephone call from the nurses, he had an obligation to treat the Decedent. Plaintiff's experts argued that if the on call physician had come to the hospital to care for the patient he could have explained the need for Lovenox, rather than leaving such an important discussion to the nurse, and perhaps persuaded the patient to take the drug, and if not, then to proceed immediately with placement of the IVC filter, rather than waiting until the next day, knowing the patient had bilateral pulmonary emboli.

#### **Defense and Risk Management Concerns:**

1. The on call physician took the position, despite preparation to the contrary, that he was not a "consulting physician." In his deposition he stated that he had not been consulted but was "on call." He further stated, "I believe a doctor should have been closely monitoring the care and condition of the patient because he had bleeding in his brain, blood clots in his leg, and blood clots in his lungs." He further stated that "if I had been 'consulted' I would have gone and seen the patient."
2. The physician failed to communicate with the Decedent's family. The treating physician asked the on call physician if he would like to talk to the family to explain what had happened. The on call physician declined to talk to the family because "I was not sure what that would accomplish when my whole interaction with the patient was five or six hours and I had never seen the patient and taken care of him. I was taking care of the patient when I was called on the telephone. I had no patient-physician

relationship other than what was described on the phone messages to me. I was not consulted on his care. I entered orders on call." The family was told by the treating physician that "the on call physician was in charge of the patient at the time of the death."

#### **Disposition:**

The Hospital filed a Motion for Summary Judgment based upon the fact that the Plaintiff's experts did not have the qualifications to render any opinions against the hospital, nor to opine as to any alleged delay performing a stat CT scan of the thorax with pulmonary embolism protocol. Thus, our Insured became the sole defendant in this case.

There was a potential sympathy factor which was of great concern to us; particularly in the jurisdiction that this case was in. The deceased left behind a young widow and two children who were ages two and five months at the time of his death.

It was difficult to find an expert witness to support the on call physician. The on call physician indicated in deposition that "had he been 'consulted' he would have visited the Decedent." This statement would not play well before a jury. He cannot hide behind the fact that he was only "on call."

Accordingly, the case was settled out of court substantially below the policy limits.

In summary, it is obvious that this case may have had a different result if the on call physician had gone to the hospital rather than being "on call" via phone only. If so, he would have had an opportunity to meet and bond with the family. The fact that he did not meet with the family afterwards was also of concern. This doctor took the position that he only treated the patient for five or six hours and that he did not have a physician-patient relationship with the deceased. Thus, he did not see a need to meet with the family. Instead, he let the treating physician meet with and console the family. The family was told by the treating physician that "the on call physician was in charge of the patient at the time of the death." As a result, the on call physician was the only physician sued. One question will go unanswered: If the on call physician had met with the family and developed a rapport with the family, would he have been sued ... or, would he then have been the sole defendant? ★

## Advocate, MD Welcomes New Members to Team

Advocate, MD is proud to announce the hiring of three new employees. We are privileged to have Jim Ward join us as a Regional Sales Manager, Kathryn Valdez as an Inside Sales Manager and Candace Leach as a Claims Tech.

**Please join us in welcoming:**

### **Jim Ward – Regional Sales Manager**

Mr. Ward has been in the health care arena for over a dozen years in a number of capacities. Most recently, Mr. Ward served as Vice President of Sales for Cardio Health Sleep Centers. In that capacity he facilitated several joint ventured Sleep Labs with large cardiology groups. He had previously held a similar position with Cardiovascular Services of America. CSA specializes in the building and management of joint ventured outpatient cardiovascular centers.

Prior to CSA Mr. Ward was with MEDAxiom, a cardiology specific benchmarking data company, in the role of Vice President. While with MEDAxiom he built their Sales and Development department as the company saw exponential growth. In the six years previous to MEDAxiom, Mr. Ward helped to build one of the original cardiology based staffing companies with tremendous success.

In his spare time Mr. Ward sits on a few health care lobby related boards, enjoys many outdoor activities, and is an active supporter of the arts.

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## Protect Yourself and Your Practice With a Free Risk Assessment and Loss Prevention Survey

Advocate, MD wants to do everything possible to help you protect your practice. We realize that the delivery of health care services by physicians and their staff is a unique, personal, and professional business relationship that carries with it a certain level of risk and exposure.

In order to limit your risk and exposure, Advocate, MD has established a free Risk Management consulting service for our policyholders. We believe that a proactive approach to managing risk and preventing loss is an integral part of our relationship with our insureds.

Our Risk Management Program and survey focuses on the needs of the professional office practice to include, but not be limited by exposures such as:

- Medical care delivery, diagnosis, treatment, consultation process and continuums
- Multitude of risks and exposures of the entire practice environment
- Medication prescription, distribution, ordering and maintenance system
- Prescribing of treatment and therapy
- Monitoring and directing the care and treatment of patients
- Directing the administration of care for patients by staff

- Directing the administration of the office practice
- Review and evaluation of various compliance issues; regulatory, and licensure
- HIPAA compliance and application
- Comprehensive review of patient records

The assessment involves an on-site visit by the Advocate, MD's Director of Risk Management, interviews with physicians, and close interaction with the practice or office manager and other staff members, as appropriate.

The assessment is a customized, definitively outlined process covering more than 200 points of a medical practice and its risk exposures. In most cases, a thorough review of 10 or more randomly selected files is conducted. At the conclusion of the survey, the Director of Risk Management will meet with the physicians and staff to review the preliminary findings and outcomes. A written, detailed and formal report will be delivered within two weeks of the visit.

Advocate, MD believes that a proactive approach to risk management is essential to controlling risk and losses, and provides a focus to help physicians provide safe, high-quality health care. ★

### **Kathryn Valdez – Inside Sales Manager**

Prior to joining Advocate, MD, Miss Valdez provided wealth management solutions to institutional and high net worth clientele for over 8 years. In addition to a full range of investment licenses including the Series 7, 63 and 65, she also holds a Life and Health Insurance License. Through this avenue she has assisted professionals in personal and business asset protection.

Miss Valdez has lived in Austin and San Francisco. A big fan of ethnic cuisine, independent films and traveling abroad, Miss Valdez has also studied a variety of languages including Spanish, Italian, Arabic and Turkish.

### **Candace Leach – Claims Tech**

Ms. Leach has over 15 years experience in office administration, including working at Neiman Hanks Insurance (Property & Casualty). She worked for Deluxe Check printers as a Customer Support Specialist in Kansas City and as an Office Administrator for an Interior Design company in Las Vegas before returning home to Texas.

Ms. Leach is very involved in the Susan G. Komen Foundation's 'Race for the Cure.' This will be her 4th year as a volunteer. She has one daughter who is attending UTSA, and in her spare time enjoys reading and playing with her two Chihuahua 'babies.'

Advocate, MD is honored to add these people to our family to help meet and exceed your needs and expectations. We plan to continue to expand through the end of 2007 and look forward to adding more exceptional people. ★



## **Volunteer Efforts Increase to 45%**

Advocate, MD is committed to the support of our local communities through sponsorship of the Make-A-Wish Foundation®, a global non-profit organization that grants the heart-felt wishes of children with life threatening medical conditions to enrich the human experience with hope, strength, and joy.

Currently, over 45% of Advocate, MD employees are volunteers for the Make-A-Wish Foundation®. Nine employees and guests volunteered for the Texas Classic Car Show in Austin benefiting the Make-A-Wish Foundation® Central and South Texas Chapter. Advocate, MD was also a proud sponsor of the Evening of Island Experience, an exclusive fundraiser held at Roy's Hawaiian Fusion Cuisine in Austin.

If you are interested in volunteering or learning more about the five Make-A-Wish Foundation® Texas Chapters, please visit their websites:

- The Central and South Texas Chapter [www.centralandsouthtexas.wish.org](http://www.centralandsouthtexas.wish.org) has granted more than 2,300 wishes since their inception in 1984.
- The North Texas Chapter [www.northtexaswish.org](http://www.northtexaswish.org) has granted more than 3,000 wishes since their inception in 1982.
- The Texas Gulf & Louisiana Chapter <http://texgulf.wish.org> has granted more than 3,900 wishes since it was founded in 1984.
- Texas Plains Chapter <http://texasplains.wish.org> has granted more than 1,000 wishes since it was founded in 1984.
- Rio Grande Chapter <http://riograndevalley.wish.org> has granted more than 400 wishes since it was founded in 1988.

We encourage you to participate in this outstanding organization that makes a tremendous difference in the lives of children. ★



# Advisor

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## Testimonials

We appreciate all of your feedback as we continue to strive to exceed the needs of our Insureds. We are here to serve you and we invite you to read what others are saying!

**“Advocate, MD provides excellent service. The staff is knowledgeable, provides timely service, and is readily available. I was quickly primed with the information needed to secure appropriate malpractice coverage after deciding to work as an independent contractor. The rate quoted was competitive.”**

*Dr. Sanjai Isaac*

**“I’m so happy to have my malpractice insurance with Advocate, DO\*, a state licensed insurance company, at a premium rate I can afford with a sizeable discount for being a member in my professional organizations, TOMA and the Texas ACOFP.”**

*William Rogers D.O.*  
*Family Practice*

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