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What's In A Name?[1] The Legal Relationship Between the Hospital and the Doctor

By Art Chenen

Multiple choice question:

California courts have held that a physician on the medical staff of a hospital is a[n] _____ of the hospital.

a. Employee
b. Independent contractor
c. Customer
d. Agent
e. Ostensible agent
f. All of the above

INTRODUCTION

The legal relationship between a hospital and its medical staff has been getting a lot of attention lately.[2] As a result, courts have repeatedly recognized medical staffs as unincorporated associations, and the law unambiguously provides that medical staffs have the right of "self governance."[3] The legal relationship between the individual physician and the hospital, on the other hand, is not one that usually gets much consideration, except from medical malpractice defense lawyers who seek to insulate hospitals from the negligence of physicians on the staff.

This situation changed somewhat in 2005 when a California Court of Appeal decided *Payne v. Anaheim Memorial Hospital,* [4] which held that a physician was a "customer" of a hospital who could state a claim under California's Unruh Civil Rights Act. [5] However, in the more recent case of *Johnson v. Riverside Healthcare System, LP*[6] the federal Ninth Circuit Court of Appeal declined to follow *Payne* and denied Unruh Act relief to a physician who claimed discrimination on the basis of sexual orientation and race because, the Court concluded, his relationship to the hospital was "indistinguishable" from that of an employee.

These conflicting conclusions should come as no great surprise because, over the years, California courts have been all over the map when trying to define the legal relationship between a hospital and its doctors. Accordingly, this article will explore some of the cases that have discussed the issue and suggest that proper analysis of the law and the facts leads to the following conclusions:

- Community physicians on the medical staff of a hospital are, in fact, "business invitees" of the hospital who are entitled to all the rights and protections afforded to the "customers" of any business. Membership on the medical staff of a hospital does not make a physician its employee, independent contractor, agent or ostensible agent.

- Hospital-based physicians who provide the basic hospital services required to obtain a hospital license (radiology, pathology, anesthesiology, and also emergency room) pursuant to the typically detailed and onerous hospital-based physician contract, are "independent contractors" of the hospital. They are also almost certainly "agents" of the hospital and the hospital should be responsible for their acts or omissions without resort or regard to questions of ostensible agency.

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1 "What's in a name? That which we call a rose By any other name would smell as sweet." Shakespeare, Romeo and Juliet, Act II, scene ii, line 43.

2 *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal. App. 4th 1098 and California Business & Professions Code § 2282.5.

3 Of course, health lawyers continue to debate whether the medical staff is an entity that is "independent" of the hospital.

4 130 Cal. App. 4th 729 (2005).

5 California Civil Code § 51 *et. seq.*

6 516 F. 3d 759 (9th Cir. 2008).

- Physicians who contract to provide other clinical services to a hospital (e.g. trauma call panel) are also "independent contractors" with respect to such services, but are not necessarily "agents" of the hospital. As such, the hospital should not be responsible for the acts or omissions of such physicians, unless "ostensible agency" can be established.

If, in fact, these conclusions are correct, hospitals and their attorneys would be short sighted to try to avoid Unruh Act or other kinds of liability by claiming a community physician is an employee or independent contractor of the hospital. So doing would open the hospital to other areas of potential liability which are at least as ominous as an Unruh Act claim.

HOLDINGS OF THE CASES

In *Payne*, the physician alleged he had been the victim of racial discrimination. The trial court dismissed the action both for failure to exhaust administrative remedies and failure to state a claim under the Unruh Act. The Court of Appeal reversed on both grounds. Dr. Payne was a community physician who was a member of the medical staff, but with no contractual or other relationship with the hospital. In holding that Dr. Payne had stated an Unruh Act claim, the Court distinguished cases which held that a physician member of a medical group could not bring an Unruh Act claim and stated:

> In this case, by contrast, the relationship at issue is between a physician and a hospital. Anaheim Memorial does not even suggest the relationship might be one of employer and employee, which would be governed by the [Fair Employment and Housing Act], and we assume it would protest mightily if Payne attempted to do so. Payne does not work for the hospital, and has no obligation to treat his patients there as opposed to any other hospital. Anaheim Memorial does not compensate Payne for his medical services, nor does it exercise any direct control over the manner in which he practices. **Instead, the hospital merely provides a facility which a qualified physician may access in connection with providing medical care to his patients.**[7]

The Court also dismissed arguments by the hospital that Dr. Payne was not a customer of the hospital because of his "elite" status as a physician or because the patients are the hospital's customers.

The dissent argued Payne was not entitled to bring an Unruh Act claim because he was an independent contractor and independent contractors are not covered by the Unruh Act.[8] The dissenting opinion, however, cited no authority for the conclusion that Dr. Payne was an independent contractor. [9]

In *Johnson*, the physician was a member of a hospital medical staff and maintained a private practice in the community. He also had a contract to provide trauma call panel coverage, for which he was paid by the hospital.[10] He claimed discrimination based upon both sexual orientation and race. In rejecting his claim for Uhruh Act protection, the Ninth Circuit concluded that Dr. Johnson's "relationship with [the hospital] was materially indistinguishable from that of an employee."[11] In so doing, the court relied primarily upon the fact that Dr. Johnson was paid by the hospital for his call panel services, but also upon the following factors:

> [A]lthough Johnson's professional services agreement referred to him as a "contractor," Riverside retained control over all material aspects of his activities at the hospital. While the parties' affiliation did not contain every component of the traditional employer-employee relationship (most notably, Riverside was not required to pay Social Security taxes for Johnson or provide him with retirement benefits), Riverside determined the shifts Johnson was responsible to work, the nurses who would be assigned to work with him, and the credentials it would be necessary for Johnson to display when inside the hospital. Riverside also required Johnson to remain a member in good standing on the Medical Staff.[12]

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7 130 Cal. App. 4th at 748.

8 *Id.* at 752.

9 Perhaps Justice Fybel had read the California Physician's Legal Handbook which also concludes, without the citation of any authority, that the hospital/physician relationship is an independent contractor relationship. CMA, California Physician's Legal Handbook, p. 35.9 (2006).

10 In the interest of full disclosure, the author's firm represented Riverside Community Hospital in the defense of one of Dr. Johnson's state court actions. The author's criticism of the Ninth Circuit's reasoning is not a suggestion that Dr. Johnson's claim of discrimination was valid.

11 It is unclear why the *Johnson* court did not just take the simple way out and follow the dissent in *Payne* and call Dr. Johnson an independent contractor. Perhaps the Ninth Circuit did not read the dissent in *Payne*; if it had, it would have learned, as Justice Fybel pointed out, that "California law effectively prohibits hospitals and the physicians who work in them from being in an employer-employee relationship (Bus. & Prof. Code §§ 2285, 2400.)"

12 516 F. 3d at 768.

The Ninth Circuit did not cite the California case of *Quintal v. Laurel Grove Hospital*[13] in support of its conclusion that Dr. Johnson was an employee of the hospital, but it would have been appropriate. In *Quintal,* a minor child admitted to a hospital for eye surgery, suffered cardiac arrest during the induction of the anesthesia. The jury found that the anesthesiologists were negligent and a judgment was entered against them and the hospital. The trial court granted a judgment notwithstanding the verdice in favor of the hospital. The Supreme Court of California reversed the dismissal, saying there was evidence in the record from which "agency" could be found. In so doing, the Court reiterated a prior holding and said:

> It should be noted that a nurse or physician may be the servant of a hospital, thus requiring the application of the doctrine of *respondeat superior* even though they are performing professional acts.[14]

The factors that the California Supreme Court pointed to in concluding that the jury could find the anesthesiologists were "servants" (*i.e.* employees) of the hospital included the facts that the anesthesiologists (i) were appointed to the medical staff by the board of the hospital, (ii) were on call by the hospital, (iii) billed the patients, and (iv) used medications, clothing, and nursing services provided by the hospital.

The Ninth Circuit's decision in *Johnson* and the California Supreme Court decision in *Quintal* are of particular interest when contrasted to the California Court of Appeal decision in *Abrahamson v. NME Hospital.*[15] Dr. Abrahamson was a pathologist with a hospital contract that allowed either party to terminate the agreement without cause on ninety days notice.[16] When the hospital exercised its right to terminate Dr. Abrahamson "without cause," he sued for wrongful termination in violation of public policy, claiming that the termination was, in fact, caused by his refusal to "condone or acquiesce in the hospital's failure to provide patient care and to require staff physicians to practice good medicine."[17]

Unlike the courts in *Johnson* and *Quintal,* the *Abrahamson* court did not conclude that Dr. Abrahamson's relationship to the hospital was "indistinguishable" from that of an employee and allow his suit to proceed. Instead, it held that he was an independent contractor and, therefore, not eligible to bring an action for wrongful termination.

Finally, there is *Mejia v. Community Hospital of San Bernardino*[18] in which a patient presented to the hospital's emergency room following a neck injury. The emergency room physician, in reliance upon an x-ray report from the radiologist finding there was no broken vertebrae, discharged the patient. The patient later became paralyzed because the radiologist missed the patient's broken neck.

The hospital sought and was granted a non-suit by the trial court based on the argument that neither the radiologist nor the emergency physician were its agents. On appeal, the California Court if Appeal reversed the non-suit, with the Court holding that there was a triable issue of fact regarding whether the physicians were "ostensible" agents of the hospital.

In so doing, the Court first noted that, in California, ostensible agency is defined by statute[19] and usually requires proof of three elements: (i) a reasonable belief in the agent's authority; (ii) that belief must be generated by some act or omission of the principal; and (iii) the person relying upon the agent's apparent authority must not be negligent. With respect to a hospital patient, the Court said:

> As should be apparent to an astute observer, there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospi-

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13 62 Cal. 2d 154 (1964).

14 *Id* at p. 167.

15 195 Cal. App. 3d 1325 (1987).

16 The opinion does not provide any other information regarding the details of the contract, but it is fairly safe to assume it was a typical hospital based physician contract that granted the hospital at least as much control over Dr. Abrahamson as Riverside Community Hospital had over Dr. Johnson.

17 195 Cal. App. 3d at p. 1328. This case was obviously pre-*Potvin*, pre-Bus. & Prof. Code § 2056, and pre-Health & Safety Code §11278.5.

18 99 Cal App. 4th 1448 (2002).

19 Civil Code §2300.

tal gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.[20]

The Court's conclusion that emergency room patients cannot be expected to inquire as to whether treating physicians are independent contractors may seem reasonable. The Court's assertion that: "Likewise, patients cannot be expected to inquire into the employment status of physicians they never met" does not, however, necessarily follow. On the contrary, it would seem that a patient could not reasonably rely on the authority of a physician he/she never met or dealt with, such as a radiologist who may read a film in the middle of the night via tele-radiology hundreds, if not thousands, of miles from the hospital.

ANALYSIS OF THE CASES

A review of just these few cases shows that the correct answer to the question at the beginning of this article is "all of the above." Courts in California have held, at one time or another, that the physician is a customer, employee, independent contractor, agent and/or ostensible agent of the hospital. This confusion is not necessary and results, in large part, from the fact that health lawyers and courts use terms interchangeably from three different areas of the law and without a consistent understanding of the labels as they relate to the hospital/physician setting.

TORT LAW

A "business invitee" and a "customer" are terms from premises liability tort law. Prior to the 1968 California Supreme Court decision in *Rowland v. Christian,*[21] the liability of a landowner was determined by the status of the entrant to property. The duty owed to an "invitee" was to exercise ordinary care. On the other hand, a landowner was liable for injury to a "licensee" or a "trespasser" only for wanton or willful injury. Since 1968, the liability of landowners in California has generally been governed by ordinary negligence standards.[22]

The business invitee/customer is a person who is invited to enter property for a purpose directly or indirectly connected with the business of the property owner.[23] A licensee is a person who is not an invitee and who is privileged to enter property by the consent of the owner; typically, this is a social guest.[24]

AGENCY LAW

The terms "agent" and "ostensible agent" are terms from the law of agency. An "agent" is a person who represents another, called the principal, in dealings with third persons.[25] An agency is "ostensible" when there is not an actual employment, but the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent.

EMPLOYMENT LAW

"Employee" and "independent contractor" are terms typically used in the employment law context. An "employee" or "servant" is one who is engaged to do something for the benefit of the employer or a third person.[26] An "independent contractor" is one who, in rendering services, exercises an independent employment or occupation and represents the employer only as to the results of the work and not as to the means whereby it is to be accomplished.[27]

The basic error reflected in court discussions of the relationship between doctors and hospitals is the failure to understand that while "employee" and "independent contractor" are mutually exclusive legal categories, "agent" and "independent contractor" are not.[28] Thus, a physician who is an independent contractor of a hospital may or may not be an agent of the hospital.

COMMUNITY BASED PHYSICIANS ARE CUSTOMERS OF THE HOSPITAL

Given these long-established and well-accepted definitions, it is absolutely clear that the *Payne* court got it right. The community based physician, who has an independent private practice, brings his/her patients to the hospital for the mutual business purposes of the physician and the hospital and clearly fits the definition of a busi-

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20 *Id.* at pp 1454-55.

21 69 Cal. 2d 108 (1968).

22 *See* Civil Code § 1714(a).

23 California Torts §15.01 (2)(b) (Matthew Bender 2007).

24 *Ibid.*

25 California Civil Code §2295; Restatement of Agency 2nd Agency §1.

26 Labor Code §2750.

27 *Green v. Soule* (1904) 145 Cal. 96.

28 *Los Angeles v. Meyers Bros. Parking System* (1975) 54 Cal. App. 3d 135; Restatement of Agency 2nd Agency §2.

ness invitee/customer. There is no contract with, or payment from, the hospital and the patient has no reason to believe his/her private physician is acting with the authority of the hospital. The hospital provides facilities in which the physician exercises his independent profession.

It is equally clear that the dissent in *Payne* does not accurately reflect what goes on between a community based physician like Dr. Payne and a hospital. The hospital did not employ or retain Dr. Payne to do anything and it certainly did not exercise any control over his provision of care to specific patients, so the basic elements of an independent contractor relationship just are not there.

The *Johnson* court was factually incorrect in saying that Dr. Johnson's status was indistinguishable from that of an employee because he had a contract to cover trauma call and received some payment for those services from the hospital. Setting aside the fact that a private hospital in California cannot employ a physician to provide medical services to the public, the indicia of employment cited and relied upon by the Ninth Circuit in this case are not only inconsequential and do not come close to establishing the control necessary to create an employment situation—they are common to the relationship of virtually every hospital and most physicians. If the criteria cited in *Johnson* are enough to make a physician a hospital employee, then any physician with a contract to cover any service for a fee in California is a hospital employee. Many, if not most, staff physicians participate on emergency room call panels; when they do, they are assigned shifts. The hospital decides which nurses work for all physicians. Many hospitals require everyone who enters the hospital, including patients and their visitors, to wear identification badges.[29] Last, all physicians with or without hospital contracts must maintain good standing on the medical staff (an entity independent from the hospital) to practice there.

Finally, and most important, the most fundamental flaw in the *Johnson* court's reasoning was the failure to recognize that Dr. Johnson wore two hats at Riverside Community Hospital. Even if he was an independent contractor for purposes of trauma call panel coverage, he also had an independent practice there and the Ninth Circuit never addressed why that fact did not give him standing to press an Unruh Act claim. For example, if the hospital had hired a black, bi-sexual electrician to perform some repair work at the hospital, and the electrician had been denied admission as a patient (invitee) because he was a black, bi-sexual, would anyone argue he could not bring an Unruh Act claim because he was also an independent contractor of the hospital? Why should there be a different result for a physician? Yes, Dr. Johnson was an independent contractor of the hospital, but as an member of the medical staff who brought his own patients to the hospital he was, just like Dr. Payne, also an invitee entitled to Unruh Act protection.

Perhaps, in the short term, hospitals might take some comfort in the *Johnson* ruling that a contract physician is tantamount to an employee so as not to qualify for Unruh Act protection. But the long term implications of such a ruling would, in fact, be ominous for hospitals. If other courts follow the Ninth Circuit's reasoning, hospital-based physicians like Dr. Abrahamson would be able to sue for wrongful termination in violation of public policies other than those directly related to patient advocacy. It would also greatly expand *Elam*-type liability and make hospitals potentially liable for any and all negligent care provided by staff physicians. Presumably, if all physicians are "indistinguishable" from other hospital employees, the hospital would have to pay the employer's share of the tax on all monies paid to physicians and cover them under worker's compensation insurance. Finally, how could a staff of employed physicians maintain the independence necessary to by truly "self governing"?

HOSPITAL-BASED PHYSICIANS WILL USUALLY BE AGENTS OF THE HOSPITAL

Just as simple analysis of the terms "customer," "independent contractor," and "employee" leads to the correct conclusion that the community based physician is a customer of the hospital, a proper understanding of the facts and the law leads to similarly clear answers to the question of when, if ever, should a hospital be liable for the acts of physicians who are not its employees, but are its independent contractors.

The usual hospital-based physicians who, under the typical lengthy and detailed contract, provide those medical services that a hospital must provide to maintain its license, or are otherwise part and parcel of what makes a hospital a hospital (*i.e.* radiology, pathology, anesthesiology, and, often, an emergency department) are independent contractors providing professional services that are not under hospital control. They also, however, clearly act on behalf of the hospital and are its agents for certain purposes. The hospital should be responsible for their acts or omissions within the scope of that agency, and without the need to resort to "ostensible" agency analysis.

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[29] By this definition, I am an employee of 2029 Century Park East because I have to show a pass to get into the building.

On the other hand, community based physician staff members who have contracts to provide some services to a hospital or its patients (*e.g.* call panel coverage), even if paid by the hospital, are still merely independent contractors for the purposes of providing such services and not necessarily agents of the hospital. The hospital should not be responsible for the acts or omissions of these physicians, unless ostensible agency established.

Finally, as previously indicated, the ordinary medical staff member is neither an employee nor an independent contractor of the hospital. He/she is the hospital's business invitee or customer and the hospital should not be liable for the acts or omissions of these physicians at all.

CONCLUSION

With all due respect to William Shakespeare, the "name" or "label" that lawyers and courts use to describe the doctor-hospital relationship can be important. As health lawyers, in addition to advocating positions that advance our clients' interests, we should also do our best to educate the courts regarding how the health care system really works so that the courts are accurate when they label the relationship between doctors and hospitals. By so doing, we will help avoid judicial decisions that reach wrong conclusions that could come back to haunt hospitals and physicians alike.

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Mr. Chenen is a nationally recognized leader in the field of health care law. He has published over 60 articles on various health law related topics and has made numerous presentations to a wide variety of groups, including the American Medical Association, California Medical Association, the American College of Healthcare Executives, the American Health Lawyers Association, and the California Society for Healthcare Attorneys. Mr. Chenen currently serves on the Board of the CSHA.