Future of Healthcare

• More patients seeking care as a result of healthcare reform.
• Aging population.
• Projected physician shortage of 125,000 doctors by 2025.

What are potential liabilities for supervising physicians?

Overview

• General rules
  — Comparative fault
  — Vicarious liability
  — Apparent agency
  — Medical practices act
  — Fraud and abuse concerns
• Application to specific cases
  — Physician assistants
  — Nurse practitioners
  — Ambulance service directors
  — Medical directors
  — Residents
  — Proctors
• Suggestions for minimizing liability

Preliminaries

• This is an overview of relevant issues.
  — Application may depend on your particular circumstances.
  — Check the law when it comes time to apply these principles.
• Please comment, ask questions, share experience.
• This is provided for educational purposes only.
  — It does not create an attorney-client relationship.
  — It does not constitute legal advice.

General Rules

“Except as otherwise provided by law, each person is responsible not only for the results of the person’s willful acts but also for an injury occasioned to another by the person’s want of ordinary care or skill in the management of the person’s property or person except so far as the person has willfully or by want of ordinary care brought the injury upon the person.” (MCA 27-1-701)

• Liable for:
  — Intentional acts.
  — Negligent acts or omissions.
### Comparative Liability*

- If defendant’s liability is 50% or less of the combined negligence of all tortfeasors, the defendant is liable for damages according to his comparative fault.
  - Several liability.
- If defendant’s liability is more than 50% of the combined negligence of all tortfeasors, the defendant is liable for all damages.
  - Joint and several liability.
  - Defendant may have right of contribution against other tortfeasors.

(MCA 27-1-703)

* Subject to contingency.

### Vicarious Liability

- “A party may be jointly liable for all damages caused by the negligence of another if:
  - both acted in concert in contributing to the claimant’s damages, or
  - if one party acted as an agent of the other.”

(MCA 27-1-703)

### Liability for Agents

- Principals are generally liable for the acts of their agents.
- “An agent is one who represents another, called the principal, in dealings with third persons.”
- “An agency is either actual or ostensible.
  - An agency is actual when the agent is really employed by the principal.
  - An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be the principal’s agent when that person is not really employed by the principal.”
- If a healthcare entity requires the provider to secure malpractice insurance, malpractice liability “may not be imposed on a health care provider ... for an act or omission by a person or entity alleged to have been an ostensible agent of the health care provider at the time that the act or omission occurred.”

(MCA 28-10-101 and -103)

### Malpractice Liability

- “For purposes of a malpractice claim, ... a health care provider ... is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider at the time that the act or omission occurred. This section does not absolve a health care provider from liability under 27-1-703.”

(MCA 27-1-738)

- Question: what does “under the control” mean?
- *See Rudeck v. Wright, 218 Mt 41, 709 P.2d 621 (1985)* (surgeon is “captain of the ship” and liable for nurse’s failure to count lap mat).

### Supervising Provider’s Direct Liability

- Supervising provider may be liable for his or her own negligence.
  - Negligence or malpractice.
  - Negligent hiring.
  - Negligent credentialing.
  - Negligent supervision.
  - Negligence per se.

*Pop Quiz*

- “When is a supervising provider liable?”
Supervising Provider’s Vicarious Liability

- Supervising provider may be vicariously liable for the acts of:
  - Agents and employees.
  - Persons under the control of the provider.
- In malpractice cases, supervising provider not vicariously liable for:
  - Ostensible agents if the provider had policies or procedures requiring the agent to carry malpractice insurance.
  - Persons who were not agents, employees, or under the control of the provider.

Supervisor’s Liability Under Medical Practices Act

- “The following is unprofessional conduct for a [provider]:
  - permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;
  - signing or issuing, in the licensee’s professional capacity, a document or statement that the licensee knows or reasonably ought to know contains a false or misleading statement;
  - assisting in the unlicensed practice of a profession or occupation or allowing another person or organization to practice or offer to practice by use of the licensee’s license.”
  (MCA 37-1-316)
- "A [provider] may be found to have violated a provision of 37-1-316 or a rule of professional conduct enacted by a governing board without proof that the licensee acted purposefully, knowingly, or negligently." (MCA 37-1-320)

Supervision for Billing Purposes

- Payors may require certain level of supervision to submit claims.
  - General: service furnished under overall direction and control of physician, but physician’s physical presence during performance not required.
  - Direct: physician is present in the office suite and immediately available to furnish assistance and direction throughout the test, but physician is not required to be in the same room.
  - Personal: physician must be in the same room.
  - In some cases, the physician must have sufficient proficiency to perform the test.
- Submitting claims without satisfying supervision requirements may violate False Claims Act.

Physician Assistants

- What agreements are required before a physician assistant may practice in Montana?
- True or False: a supervising physician is liable for the acts or omissions of the PA.
- What is the scope of practice for a PA?
- What is the level of supervision that a supervising provision must provide to the PA?
- If a supervising physician is not onsite, what must be in place to allow the PA to continue to practice?
Physician Assistant Quiz

• How many PAs may one physician supervise?
• How often must a supervising physician meet face-to-face with the PA?
• How many of the PAs charts must the supervising physician review monthly?
• Is a backup supervising physician liable for the PAs acts or omissions?
• Is the primary supervising physician liable for the PAs actions while the backup physician is on duty?
• Is the supervising physician required to see the PA’s patient if requested by the patient?

Physician Assistants

• Physician assistants ("PAs") must be licensed in Montana.
• To utilize a PA, entity must have:
  – Supervising physician.
  – MD or DO licensed in Montana.
  – Supervision agreement.
  – Duties and Delegation agreement. (MCA 37-20-101, -104, -301, -411)
• PA and supervising physician “shall keep the supervision agreement and the duties and delegation agreement at their place of work and provide a copy upon request to a health care provider, a health care facility, a state or federal agency, the board, and any other individual who requests one.” (MCA 37-20-301)

Supervision Agreement

Supervision Agreement:

Physician Assistants: Supervision Agreement

PA must submit a supervision agreement to the board on a form prescribed by the department. (MCA 37-20-301)
• Form summarizes statutes and regulations.
• Supervising physician agrees to:
  – Comply with regulations regarding supervision.
  – Be professionally and legally responsible for the care and treatment of a patient by the PA.
  – Specify means for alternate supervising physician.

Physician Assistants: SA Supervisor’s Attestation

"I affirm that I have read and understand the current Board of Medical Examiners statutes and rules, including those pertaining to PAs, supervision agreements and duties and delegation and my responsibilities as supervising physician. I acknowledge and agree pursuant to MCA 37-20-101, 37-20-301, 37-20-403 to exercise appropriate supervision over the above named PA in accordance with all statutes and rules of the Board of Medical Examiners. I acknowledge and agree that I will retain professional and legal responsibility for the care and treatment of patients by the above named PA. I understand that duties and responsibilities may be delegated, or restrictions imposed, at my discretion, including additional limitations on prescribing and dispensing of drugs above those granted by the Board ... and will be reflected in the duties and delegation agreement."
(Board Form, Supervision Agreement)

Duties and Delegation Agreement:
**Physician Assistants: Duties and Delegation Agreement**

“A supervising physician and the supervised PA shall execute a duties and delegation agreement constituting a contract that defines the PA’s professional relationship with the supervising physician and the limitations on the PA’s practice under the supervision of the supervising physician. The agreement must be kept current, by amendment or substitution, to reflect changes in the duties of each party occurring over time.” (MCA 37-20-301)

- Specifies the duties that may be performed by PA.
- See sample form
  - Practice site
  - Practice setting and duties
  - Supervision method
  - List all duties that are not delegated

**Physician Assistants: Treatment Authority**

- “A PA may diagnose, examine, and treat human conditions, ailments, diseases, injuries, or infirmities, either physical or mental, by any means, method, device, or instrumentality authorized by the supervising physician.” (MSA 37-20-403, emphasis added)
- May be limited by the duties and delegation agreement.

**Physician Assistants: Prescribing Authority**

“A PA may prescribe, dispense, and administer drugs to the extent authorized by the supervising physician, including:

(a) Prescribing, dispensing, and administration of Schedule III drugs listed in 50-32-226, Schedule IV drugs listed in 50-32-229, and Schedule V drugs listed in 50-32-232 is authorized.

(b) Prescribing, dispensing, and administration of Schedule II drugs listed in 50-32-224 may be authorized for limited periods not to exceed 34 days.

(c) Records on the dispensing and administration of scheduled drugs must be kept.

(d) A physician assistant shall maintain registration with the federal drug enforcement administration if the physician assistant is authorized by the supervising physician to prescribe controlled substances.”
(MCA 37-20-404, emphasis added)

**Physician Assistants: DDA Supervisor Attestation**

“I agree to provide supervision to the PA named in this duties and delegation agreement at the practice settings indicated below, with the general duties and method of supervision as described.

“Medical Staff Privileges granted to the PA are attached and describe the specific duties delegated. Medical Staff Privileges will be reviewed periodically, as defined by (facility) Medical Staff By-laws.

“In my absence, the PA will be supervised by the physician(s) on call. I understand that I remain responsible for the PA’s actions.”

(Board Form, Duties and Delegation Agreement)

**Physician Assistants: Supervision**

- “Onsite or direct supervision of a PA by a supervising physician is not required if:
  - the supervising physician has provided a means of communication between the supervising physician and the PA or
  - an alternate means of supervision in the event of the supervising physician’s absence.”
  (MSA 37-20-403)

- “A supervising physician may provide the following types of supervision:
  (a) direct supervision;
  (b) onsite supervision; or
  (c) general supervision.”
  (ARM 24.156.1622)

* Special rules apply to non-routine applicants.
Physician Assistants:
Supervision

“A supervising physician may supervise more than one PA if the supervising physician:
(a) agrees to supervise more than one PA by signing and filing multiple supervision agreements with the board;
(b) provides appropriate and real time means of communication or back up supervision for the PAs;
(c) determines the appropriate level of supervision (direct, on-site, or general), based on the PA’s education, training, and experience; and
(d) assumes professional and legal responsibility for all PAs under the supervising physician’s supervision regardless of the varying types of supervision.”

(ARM 24.156.1622)

Physician Assistants:
Face-to-Face Meetings

“The supervising physician shall meet face-to-face with each PA supervised a minimum of once a month for the purposes of discussion, education, and training, to include but not be limited to practice issues, patient care, and chart reviews in accordance with ARM 24.156.1623.”

(ARM 24.156.1622(3), emphasis added)

Physician Assistants:
Chart Review

“(1) The supervising physician shall review a minimum of 10% of the PA’s charts on at least a monthly basis.
(2) Chart review for a PA having less than one year of full time practice experience from the date of initial licensure must be 100% for the first three months of practice, and then may be reduced to not less than 25% for the next three months, on a monthly basis, for each supervision agreement.
(3) The supervising physician shall countersign and date all written entries that have been chart reviewed and shall document any amendments, modifications, or guidance provided.
(4) Chart review for a PA who has been issued a probationary license must be 100% on a monthly basis, unless the board terminates the probationary period.”

(ARM 24.156.1623, emphasis added)

Physician Assistants:
Backup Supervision

“When the supervising physician is unavailable by means of communication the following alternate means will apply:
• The supervising physician will provide for a back up supervisor to supervise the PA when the supervising physician is unavailable.
  – A list of the back up supervising physician(s) must be on file with the duties and delegation agreement, kept current and available upon request by the Board.
  – Having a back up supervising physician doesn’t relieve the supervising physician listed in this agreement of the professional and legal responsibilities for the care and treatment of patients by the PA listed above.) or
• The PA will cease to practice when the supervising physician is unavailable.”

(Board Form, Supervision Agreement)

Physician Assistants:
Agent of Supervising Physician

“A physician assistant is considered the agent of the supervising physician with regard to all duties delegated to the physician assistant and [the supervising physician] is professionally and legally responsible for the care and treatment of a patient by a physician assistant... A health care provider shall consider the instructions of a physician assistant as being the instructions of the supervising physician as long as the instructions concern the duties delegated to the physician assistant.”

(MSA 37-20-403)

• Agency limited to delegated duties.
• Only liable for delegated duties?

Physician Assistants:
Emergency Situations

“(1) A physician assistant licensed in this state [or another state] in response to an emergency or ... disaster may provide that care either without supervision as required by this chapter or with whatever supervision is available. The provision of care allowed by this subsection is limited to the duration of the emergency or disaster...
(3) A physician assistant ... who voluntarily, gratuitously, and other than in the ordinary course of employment or practice renders emergency medical care during an emergency or disaster ... is not liable for civil damages for a personal injury resulting from an act or omission in providing that care ... if the injury is caused by simple or ordinary negligence and
• if the care is provided somewhere other than in a health care facility as defined in 50-5-101 or a physician’s office where those services are normally provided.”

(MCA 37-20-410)
Physician Assistants: Emergency Situations

“(2) A physician who supervises a physician assistant providing medical care in response to an emergency or disaster ... need not comply with the requirements of this chapter applicable to supervising physicians...

“(4) A physician who supervises a physician assistant voluntarily and gratuitously providing emergency care at an emergency or disaster ... is not liable for civil damages for a personal injury resulting from an act or omission in supervising the physician assistant if the injury is caused by simple or ordinary negligence on the part of the physician assistant providing the care or on the part of the supervising physician.”

(MCA 37-20-410)

Physician Assistants: Patient Rights

“If the patient is being medically cared for or treated by a PA:

(a) The patient may request to be treated or seen by the supervising physician in lieu of the PA, if the supervising physician is available.

(b) If the supervising physician is not available, the patient must be given an explanation for the unavailability of the supervising physician and the patient’s request and explanation must be documented in the patient’s chart at the time of the request. The patient must also be given the opportunity to be treated by the supervising physician when the supervising physician is available.

(c) The PA shall report to the supervising physician the patient’s request to be seen or treated by the supervising physician.”

(ARM 24.156.1624)

Advance Practice Registered Nurses (“APRNs”)

Advance Practice Registered Nurse (“APRN”)
- Certified Nurse Practitioner (“CNP”)
- Certified Nurse Midwife (“CNM”)
- Certified Registered Nurse Anesthetist (“CRNA”)
- Clinical Nurse Specialist (“CNS”)

(ARM 24.159.1413)

“An APRN licensed in Montana may only practice in the role and population focus in which the APRN has current national certification.” (ARM 24.159.1406)

ARPN Quiz

• What are the categories of APRNs under Montana law?
• What is the scope of an ARPN’s practice?
• Is the supervising physician liable for the acts or omissions of the ARPN?

APRNs

• Advance Practice Registered Nurse (“APRN”)
  - Certified Nurse Practitioner (“CNP”)
  - Certified Nurse Midwife (“CNM”)
  - Certified Registered Nurse Anesthetist (“CRNA”)
  - Clinical Nurse Specialist (“CNS”)

(ARM 24.159.1413)

“An APRN licensed in Montana may only practice in the role and population focus in which the APRN has current national certification.” (ARM 24.159.1406)
APRNs: Certified Nurse Practitioners

“Certified Nurse Practitioner (CNP) practice means the independent and/or collaborative management of primary and/or acute health care of individuals, families, and communities across settings. The CNP is certified in acute or primary care and in the population focus of adult/geriatric, pediatric, neonatal, family/individual health across the lifespan, women’s/gender-related, and/or psychiatric/mental health.” (ARM 24.159.1470)

APRNs: Certified Nurse Midwives

“Certified Nurse Midwifery (CNM) practice means the independent and/or collaborative management of care of women throughout the lifespan. The CNM is certified in the population focus of women’s/gender-related health and provides a full range of primary health care services to women throughout the lifespan, including gynecologic care, family planning services, preconception care, prenatal and postpartum care, childbirth, and the care of the newborn in diverse settings. The practice includes treating the male partner of their female clients for sexually transmitted diseases and for reproductive health.” (ARM 24.159.1475)

APRNs: Certified Reg. Nurse Anesthetists

“Certified Registered Nurse Anesthetist (CRNA) practice is the independent and/or collaborative performance of any act involving the determination, preparation, administration, or monitoring of anesthesia care and anesthesia-related services, and the management of acute and chronic pain. The CRNA is certified in the population of family/individual health across the lifespan whose health status may range from healthy through all recognized levels of acuity, including persons with immediate, severe, or life-threatening illnesses or injuries in diverse settings.” (ARM 24.159.1480)

APRNs: Clinical Nurse Specialist

“Clinical Nurse Specialist (CNS) practice means the independent and/or collaborative delivery and management of individuals, families, groups, and communities. CNS practice integrates nursing practice, which focuses on assisting patients in the prevention or resolution of illness, with medical diagnosis and treatment of disease, injury, and disability. In addition to providing direct patient care, CNSs influence care outcomes by providing expert consultation for nursing staff and by implementing improvements in health care delivery systems. CNS certification may include the population focus of adult/geriatric, pediatric, neonatal, family/individual, and/or psychiatric/mental health.” (ARM 24.159.1485)

APRNs: Treatment Authority

“APRN practice is an independent and/or collaborative practice and may include:...
(a) establishing medical and nursing diagnoses, treating, and managing patients with acute and chronic illnesses and diseases; and
(b) providing initial, ongoing, and comprehensive care, including:
(i) physical examinations, health assessments, and/or other screening activities;
(ii) prescribing legend and controlled substances when prescriptive authority is successfully applied for and obtained;
(iii) ordering durable medical equipment, diagnostic treatments and therapeutic modalities, laboratory imaging and diagnostic tests, and supportive services, including, but not limited to, home healthcare, hospice, and physical and occupational therapy;...” (ARM 24.159.1406)

APRNs: Treatment Authority (cont.)

APRN practice is an independent and/or collaborative practice and may include:...
(v) receiving and interpreting results of laboratory, imaging, and/or diagnostic studies;
(vi) working with clients to promote their understanding of and compliance with therapeutic regimens;
(vii) providing instruction and counseling to individuals, families, and groups in the areas of health promotion, disease prevention, and maintenance, including involving such persons in planning for their health care; and
(viii) working in collaboration with other health care providers and agencies to provide and, where appropriate, coordinate services to individuals and families. (ARM 24.159.1406)
APRNs: Prescriptive Authority

“(1) Only an APRN granted prescriptive authority by the board may prescribe, procure, administer, and dispense legend and controlled substances pursuant to applicable state and federal laws and within the APRN’s role and population focus. (2) Prescriptive authority permits the APRN to receive, sign for, record, and distribute pharmaceutical samples to patients in accordance with applicable state and federal Drug Enforcement Administration laws, regulations, and guidelines in accordance with 37-2-104, MCA. (3) All APRNs who hold an unencumbered license and meet the qualifications for prescriptive authority within ARM 24.159.1463 may hold prescriptive authority.” (ARM 24.159.1461)

APRNs: Supervision

• Generally do not require supervising physician.
  — Exception: “An APRN working pursuant to a probationary license must work under the direct supervision of another APRN or physician who has prior board approval and possesses a current, unencumbered license.” (ARM 24.159.1436)

APRNs

“The APRN is accountable to patients, the nursing profession, and to the board for complying with the rules and statutes for the quality of advanced nursing care rendered, for recognizing limits of knowledge and experience, for planning for the management of situations beyond the APRN’s expertise, and for consultation with or referring patients to other health care providers as appropriate.” (ARM 24.159.1405)

Registered Nurses (“RNs”) and Licensed Practical Nurses (“LPNs”)

RNs and LPNs

• RNs and LPNs generally cannot practice independently.
  — Require licensed provider’s orders or supervision.
  — For purposes of a malpractice claim, ... a health care provider ... is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider at the time that the act or omission occurred.” (MCA 27-1-738)

• Provider may be liable for nurse if nurse was:
  — Acting as the employee or agent of the provider, or
  — Otherwise under the control of the healthcare provider.

Licensed Practical Nurses: Cosmetic Procedures

“(1) The practical nurse who has the proper training and on-going competency and while under the direct supervision of a physician or APRN may perform procedures using the following technologies:
  (a) lasers;
  (b) intense pulsed light sources;
  (c) microwave energy;
  (d) radio frequency;
  (e) electrical impulses; and
  (f) dermatologic technologies that cut or alter living tissue.

(2) The practical nurse who has the proper training and on-going competency and while under the direct supervision of a physician or APRN may inject or insert the following:
  (a) botulinum toxins, commonly referred to as “botox”;
  (b) natural and synthetic collagens;
  (c) silicone;
  (d) sclerotherapy agents; or
  (e) natural or synthetic filler materials.” (ARM 24.159.1006)
“Medical director’ means an unrestricted Montana licensed physician or physician assistant who is responsible professionally and legally for providing medical direction and oversight to a licensed emergency care provider (“ECP”) and/or for the training provided in an approved program/course.”  (ARM 24.156.2701, emphasis added)

What does this mean?

Montana statutes distinguish between medical directors who:
- Volunteer or are paid less than $5000, and whose regular practice is not in an emergency or trauma department.
- Who are paid more than $5000 or whose regular practice is in an emergency or trauma department.

Ambulance Service Directors

“(1) Each emergency medical service approved for a BLS license with authorization for limited ALS, or licensed at the intermediate life support or advanced life level shall have a service medical director.

“(2) The requirements and responsibilities of the service medical director shall be to provide offline medical direction as defined in 50-6-302, MCA.

“(3) An emergency medical service defined under (1) must have a two-way communications system, approved by the department, which enables online medical direction.”

(ARM 37.104.218)

Ambulance Service Director:
Offline Direction

“Offline medical direction’ means the function of a board-licensed physician or physician assistant in providing:
(a) medical oversight and supervision for an emergency medical service or an emergency medical technician; and
(b) review of patient care techniques, emergency medical service procedures, and quality of care.”

(MCA 50-6-302(8))

Ambulance Service Director:
Online Direction

“Online medical direction’ means the function of a board-licensed physician or physician assistant or the function of a designee of the physician or physician assistant in providing direction, advice, or orders to an emergency medical technician for prehospital and interfacility emergency care as identified in a plan for offline medical direction.”

(MCA 50-6-302(9))
**Ambulance Service Director: Online Direction**

“A physician, physician assistant, or registered nurse ... who provides online medical direction to a member of an emergency medical service
[a] without compensation or for compensation not exceeding $5,000 in any 12-month period, and
[b] whose professional practice is not primarily in an emergency or trauma room or ward,
is not liable for civil damages for an injury resulting from the instructions, except damages for an injury resulting from the gross negligence of the physician, physician assistant, or nurse, if the instructions given by the physician, physician assistant, or nurse are:
(a) consistent with the protocols and the offline medical direction plan approved by the department in licensing the emergency medical service; and
(b) consistent with the level of licensure of the emergency medical services personnel instructed by the physician, physician assistant, or nurse.”
(MCA 50-6-317)

**Ambulance Service Directors**

- Ambulance service directors who:
  - Are paid more than $5000/year, or
  - Whose regular practice is in emergency or trauma department,
- General malpractice rules would appear to apply.
  - “For purposes of a malpractice claim, ... a health care provider ... is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider at the time that the act or omission occurred.” (MCA 27-1-738)
  - May be liable for their own negligence. (MCA 27-1-701)

**Medical Directors**

- Regulatory performance requirements
  - Medical directors may have obligations under applicable statutes or regulations.
    - Expertise or credentials
    - Policies and procedures
    - Supervision of personnel or operations
    - Reporting
  - Failure to comply with regulations may expose medical director to liability or adverse licensure action.
* Check relevant statutes and regulations.

**Medical Directors**

- Medical director services may include:
  - Administrative services
  - Clinical services
- Make sure you:
  - Know your obligations.
    - Contract
    - Statutes and regulations
    - Common law tort duties
  - Have the time and competence to fulfill obligations.

**Medical Directors**

- Insurance concerns
  - Your malpractice insurance may not cover medical director services.
    - Administrative services
    - Services performed for another entity
    - Regulatory claims
  - Facility’s insurance may or may not cover medical directors.
- Confirm your insurance coverage or require facility to insure and/or indemnify you.
Medical Directors

- Fraud and abuse concerns
  - Medical director agreement may create compensation relationship that triggers Stark and Anti-Kickback Statute.
  - Structure arrangement to fit within applicable safe harbors.
    - Employment exceptions.
      - Fair market value not based on referrals.
    - Personal services or fair market value exceptions.
      - Written contract for at least one year.
      - Compensation set in advance.
      - Fair market value not based on referrals.
    - Ensure parties perform per agreement.

Residents

- Cases from other jurisdictions are inconsistent.
- In Montana, “for purposes of a malpractice claim, ... a health care provider ... is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider at the time that the act or omission occurred,...” (MCA 27-1-738)
- Supervisor may be liable for their own negligence.

Proctors

- Proctors have generally not been liable for the negligence of those proctored.
  - No physician-patient relationship to support malpractice claim.
  - Possible peer review immunity.
- However, proctors may become liable if they participate in or bill for the patient’s care.
  - Beware reference to proctor’s participation in electronic health records.

Minimizing Supervisor’s Liability

Kim C. Stanger
208-383-3913
k cstanger@hollandhart.com
www.hollandhart.com
www.hhhealthlawblog.com
### Minimizing Supervisor's Liability

- Do not agree to supervise unless it is necessary.
  - "No good deed goes unpunished..."
- Carefully review relevant contracts and regulations before agreeing to supervise.
- Be careful about supervising someone outside your practice, especially PAs.
  - Generally no vicarious liability unless you assume duty.
  - Difficult to monitor someone outside your practice.
- Limit scope of supervisory services where possible.

### Minimizing Supervisor's Liability

- Do not supervise services that are outside your expertise.
- Ensure you understand your responsibilities.
  - Applicable statutes and regulations, e.g., PAs.
  - Contract terms.
  - Standard of care.
  - Other?
- Modify your obligations if necessary.
  - Contract obligations.
  - Duties and delegation agreement.
- Do not agree to supervise unless you are willing to fulfill your responsibilities.

### Minimizing Supervisor's Liability

- Check your insurance.
  - Coverage for yourself in your capacity as a supervisor (e.g., as medical director, as supervisor of a PA, etc.).
  - Coverage for yourself based on acts of third parties, including midlevels, medical directors, etc.
- Require supervisees to carry adequate insurance covering their acts.
  - Reduces plaintiff's incentive to sue supervisor.
  - Avoids liability for ostensible agents.
- Require facility or PA to provide insurance coverage for supervisor.
- Include indemnification clauses in contracts.

### Minimizing Supervisor's Liability

- Check credentials of supervisee before hiring, contracting with, or agreeing to supervise them.
  - Licensure
  - Education
  - Work history
  - Specialty training and certifications
  - Continuing medical education
  - Not excluded from government programs
  - Criminal background
  - References
  - Other
- Periodically recheck credentials or competence.
- Ensure they receive ongoing training.

### Minimizing Supervisor's Liability

- If you are going to supervise, then supervise in accordance with applicable laws, regulations, or other requirements.
  - Properly train and retrain the supervisee as necessary.
  - Monitor performance closely, especially at first.
  - Periodically review supervisee’s performance, e.g., chart audits.
  - Remain available to communicate.
  - Timely respond to any concerns or questions.
    - Maintain privilege to the extent you are able.
    - Document your actions.
- Do not enable persons to practice without a license.

### Minimizing Supervisor's Liability

- Define the scope of supervisee’s services.
  - See duties and delegation agreement.
  - Limitations on authority or delegation.
  - Practice settings.
  - Procedures.
  - Prescriptive authority.
  - Protocols.
  - Communication or consultation with supervisor.
- Ensure supervisee is practicing within their license, training, and competence.
Minimizing Supervisor’s Liability

• Do not become directly involved in patient’s care unless required to do so under applicable law or payor requirements.
  – May consult.
  – Do not meet with patient.
  – Do not order treatment or diagnostics.
  – Do not bill for your services.
• Ensure informed consents disclose who is providing services and patient is aware of person’s status.
  – Use appropriate nametags.

Minimizing Supervisor’s Liability

• Do not sign supervisee’s charts unless required to do so under applicable law or payor requirements.
  – Signing charts suggests that supervisor is involved in patient’s care.
  – Signing charts suggests that supervisor has reviewed and approved the info in the chart.
• Some statutes or regulations require review of charts, e.g., PAs.

Minimizing Supervisor’s Liability

• Terminate agency or employees, if necessary.
• Terminate supervisor status, if necessary.
  – Comply with applicable laws, regulations and other requirements.
  – Notify relevant entities or agencies.
  – Document your actions.
• Confirm status of insurance post-termination.
  – Occurrence based status.
  – Tail insurance.

Minimizing Supervisor’s Liability

• Do not become directly involved in patient’s care unless required to do so under applicable law or payor requirements.
  – May consult.
  – Do not meet with patient.
  – Do not order treatment or diagnostics.
  – Do not bill for your services.
• Ensure informed consents disclose who is providing services and patient is aware of person’s status.
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Minimizing Supervisor’s Liability

Any Questions?

Kim C. Stanger
Holland & Hart LLP
(208) 383-3913
kcstanger@hollandhart.com