



The admissibility of a defendant's written policies and procedures as evidence of the standard of care

From hospitals to railroads, police agencies to banking, P&P can be used to establish duty and standards of care



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In a medical negligence case, it is common to see a "form" motion in limine from the defendant seeking to bar evidence of the hospital's own written policies and procedures. The standard defense argument is that the standard of care is established by expert testimony as to what a reasonable health care provider would do under the same or similar circumstances, not what is set forth in the written policies and procedures of the hospital or the department.

Defendant's position is without merit. The written policies and procedures of a hospital are admissible as *some* evidence of the standard of care expected of it. Moreover, contracts between the providers similarly are relevant and admissible to establish duty and breach of duty.

In *Jutzi v. County of Los Angeles* (1988) 196 Cal.App.3d 637, the plaintiff contended that the hospital acted below the standard of care by allowing an emergency room physician to treat an orthopedic injury. At trial, defendant hospital introduced evidence of its own written policy that permitted an emergency medicine physician to treat an orthopedic injury. The plaintiff challenged this testimony, but the Court of Appeal held that it was properly admitted:

Certainly the hospital's written policy concerning the types of injuries treatable by its emergency room physicians in 1976 was relevant to the issues before the trier of fact. (*Id.* at p. 653.)

The court determined, therefore, that the scope of practice of the emergency room physician, as defined by the hospital's written policies, was thus properly admitted to prove that the hospital did not violate the standard of care applicable to it.

Written rules can show some evidence of reasonableness or breach

Just as compliance with an entity's written rules might be *some* evidence of reasonableness, *violation* of written rules is evidence of a breach of the standard of care.

In *Flowers v. Torrance Memorial Hosp. Med. Ctr.* (1994) 8 Cal.4th 992, 45, an emergency room patient fell from a gurney because its side rails had not been raised to protect her. The trial court granted summary judgment finding no professional negligence, but the appellate court reversed finding that the pleadings could be construed as a claim for ordinary negligence as well as professional negligence. The Supreme Court reversed the appellate court, holding that there is no distinction between ordinary negligence and professional negligence in an action against a hospital.

The Supreme Court in *Flowers* remanded that action to the appellate court to determine whether the evidence supported a finding that the hospital breached the standard of care it owed to a patient. In this context, Justice Mosk concurred, noting that evidence that the hospital violated its own written policies was *highly relevant* to the determination of negligence:

One piece of evidence highly relevant to the foregoing determination is the hospital's own policy statements on the appropriate medical procedures to be followed. *Although such policy statements are not necessarily the definitive word on the community standard of care, they can be more reliable reflections of that standard than, for example, the declarations of expert witnesses: the former are forward-looking prescriptions of proper medical practice, while the latter can be viewed as post hoc justifications of past behavior designed for use in litigation.*

(*Id.* at 1003.) (Mosk, J., concurring) (emphasis added). See also *Gaenslen v. Board of Directors of St. Mary's Hosp. & Med. Ctr.* (1985) 185 Cal.App.3d 563, 569, [medical



staff internal by-laws articulate standard of care required of physicians].

The well-settled rule, that the rules of an entity are evidence of the standard of care, is not unique to hospitals. It has its origins in other contexts, and has been cited by the Supreme Court and a plethora of Courts of Appeal. In *Powell v. Pacific Electric Rwy. Co.* (1950) 35 Cal.2d 40, 46, the Supreme Court held that a railway's operating rules, and evidence of their violation, are admissible on the issue of whether the defendant acted negligently. In language that is as apt now as it was over 50 years ago in that case, the Supreme Court stated:

The rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings. . . . While a violation of such rule would not constitute negligence per se, it would be a circumstance for the jury to consider on the issue of respondent's negligence. (*Id.* at 46.) (Citations omitted; emphasis added.) See also *Davis v. Johnson* (1954) 128 Cal.App.2d 466, 472, [citing with approval Wigmore on Evidence and holding that "the regulations adopted by an employer for the conduct of a factory or a transportation system, may be some evidence of his belief as to the *standard of care* required, and thus of the negligent nature of an act violating those rules . . . *It is well settled that such rules are admissible in evidence and their violation is a circumstance to be considered in determining negligence*" (internal quotations omitted; emphasis added).] and *Barclay Kitchen, Inc. v. California Bank* (1962) 208 Cal.App.2d 347, [bank officers testified that bank employees violated its own policies and procedures, thus facilitating a misappropriation of funds; *held*, evidence supported finding of negligence by the bank].

Violation of written rules may point to negligence

Evidence that an employee violated an entity's written rules that are directed

toward safety constitute strong evidence of negligence. In *Dillenbeck v. Los Angeles* (1968) 69 Cal.2d 472, the trial court refused to admit evidence that a police officer violated the rules for driving safely when using lights and siren. The Supreme Court held that the rules should have been admitted into evidence and the refusal to do so was reversible error:

The safety rules of an employer are thus *admissible as evidence that due care requires the course of conduct prescribed by the rule*. Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise. (*Id.* at 478; emphasis added.)

A defendant's written policies and procedures which pertain to the very same treatment that is the subject of a malpractice lawsuit would be directly relevant on the issue of the standard of care. Indeed, expert testimony can rely upon the policies to establish that the defendant's written policies and procedures represented the minimum standard of care. Certainly the duty of a defendant's employee to follow the policies and procedures as a *condition of employment* can support an opinion by an expert that the employee had a duty to do the very act prescribed by the written policy.

Many times, written policies and procedures are instituted as a requirement of State regulations. Without those written policies, for instance, a midwife or a physician assistant would be practicing medicine without a license. Those written policies and procedures are thus evidence of the standard of care and – in certain circumstance – of its breach as well.

Through discovery, it is crucial to establish that the hospital-enacted policies and procedures were initiated and developed for the safety of patients – including the plaintiff – during its care and treatment. The hospital cannot credibly assert that the rules have no purpose, or are merely suggestions. These rules were written by doctors and nurses and are

usually reviewed and approved by an Interdisciplinary Practice Committee; reviewed and approved by a medical executive committee; and ultimately reviewed and approved by the hospital's Governing Board.

As the California Supreme Court said in *Dillenbeck*, using language that is just as applicable here: "Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise." (*Id.* at p. 478.)

During the course of discovery, it is well advised to ask appropriate questions during depositions of employees and managing agents to establish that the policies and procedures were put into place as part of a plan to provide appropriate medical services to its patients, that following those policies was a condition of employment, and that the degree of compliance with the hospital policies was a factor in evaluating work performance. One could also inquire about whether the failure to comply with the policies could subject the employee to disciplinary action, including termination of employment.

Contractual arrangements can also serve as the basis for creating duty in a negligence matter. In *Shin v. Kong* (2000) 80 Cal.App.4th 498, 504, the court stated: "A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties" (citing *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803; *Alexandria S. v. Pacific Fertility Medical Center, Inc.* (1997) 55 Cal.App.4th 110, 116.)

Multiple contracts exist between doctors, clinics and hospitals

It is not infrequent that there are multiple contractual relationships between doctors, clinics and hospitals. For instance, a physician may provide direct care for a patient but separately have administrative duties for the unit where the patient is being treated, for which he is



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paid by the hospital. The contract between the doctor and the hospital is relevant to the action because it covers his services in his administrative capacity over the very unit where the patient is being treated. A physician may work in an emergency room for a medical group. Many times, the medical group will have a contract with the hospital to provide physician services for the emergency room. The contract between the group and hospital is important to establish what the parties believed was the division

of duties and responsibilities between them and is relevant to show their intent. The agreement can also be evidence of what they agreed was the minimum standard of care. There are many other potential uses of similar contracts.

“Form” motions in limine to preclude evidence of policies and procedures or contracts between the parties should be opposed. Policies and procedures are admissible on many levels and can greatly aid your client in establishing duty and breach.

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