

Can Academic Materials Written by Physicians Constitute Binding Statements of Medical Institutions?

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It is well known that anything you say can be used against you in a court of law—but what if *you* did not say it? Can the words of others be held against you? In recent years, plaintiffs in medical malpractice cases have tried to introduce academic articles, textbooks, and peer-reviewed journal articles written by non-party physicians as the binding statements of defendant parties (hospitals, clinics, etc.). In *Stowell v. Huddleston*, for example, the plaintiffs sought to rely on a practice advisory article as an admission of the defendant Mayo Clinic because one of its authors was an anesthesiologist at the Mayo Clinic.^[1] The U.S. District Court for the District of Minnesota rejected the plaintiffs' argument because they failed to meet their burden of establishing that the article fell within the scope of Federal Rule of Evidence 801(d)(2), which governs the statements of opposing parties.^[2] While the tactic was unsuccessful in the *Stowell* case, it raises the question of whether the Rules of Evidence could permit plaintiffs to use the content of published materials as admissible statements of the defendant party. And if so, what effect might that have on medical malpractice lawsuits and journal publications?^[3]

Legal Background

Under the Federal Rules of Evidence, a party's statements are admissible evidence at trial as long as the statements are relevant and offered by an opponent.^[4] The key question in assessing the admissibility of academic materials, then, is whether they can be considered the statements of a party. Rule 801(d)(2) carves out certain requirements that provide guidance as to what constitutes a party's statements. Specifically, the rule declares that an opposing party's statement can be admissible as substantive evidence if the statement is offered against the declaring party and (a) was made by the party in an individual or representative capacity; (b) is one the party manifested that it adopted or believed to be true; (c) was made by a person whom the party authorized to make a statement on the subject; (d) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (e) was made by the party's co-conspirator during and in furtherance of the conspiracy.^[5] For all the reasons explored below, standard peer-reviewed articles or academic materials generally do not qualify as party admissions under the requirements of Rule 801(d)(2). But, there are unique instances in which a court might consider them technically admissible under the current state of the law.

Medical Facilities Do Not Write Peer-Reviewed Articles

The first subpart of 801(d)(2) recognizes that a party itself may make an out-of-court statement contrary to its position at trial. Generally, the section does not apply to hospitals or health systems named as parties in lawsuits, however, as the entities themselves typically are not the authors of any journal articles. Peer-reviewed articles usually are written by physicians with expertise in a particular discipline—by their nature, they are not actually created by an institution.

Of course, 801(d)(2) is not limited to a literal interpretation. While an entity may not write an article, it may solicit and publish materials under its own name. For example, a hospital may not draft research findings itself, but the organization may solicit and publish peer-reviewed materials under

its own name through a journal. Do the articles in the journal constitute statements of that entity? Or, imagine that a group of doctors employed by Hospital X authored a peer-reviewed article entitled the “Hospital X Method” that touted the merits of a particular surgical approach adopted and used at the hospital. Could plaintiffs successfully argue that the article constituted a statement by Hospital X even though the hospital did not technically write it? To complicate matters further, what if the article was written in 1995 and Hospital X no longer followed the surgical approach—could the article still be viewed as a statement from the hospital? The short answer to all these questions should be no, but the hypothetical article inches far closer to a party opponent admission than a generic piece that does not center on a hospital’s particular methods.

As a general matter, medical facility defendants do not publish statements in journal articles so the first option under 801(d)(2) will often be inapplicable. But practitioners and defendants should be alert for potential arguments that an article or textbook published by an institution, or dedicated to an institution’s specific practices, might be open to differing interpretations by courts.

A Health Care System Does Not Automatically Adopt the Statements Made by Its Affiliated Physicians in Published Articles

For statements to be considered “adoptive admissions” under subsection 801(d)(2)(B), a party must manifest an adoption or belief in the truth of the statements.^[6] Under this approach, it is not enough for the party to “merely repeat” the statement, but rather the party must make use of the statement or incorporate the substance of it into its own statement.^[7] Applied to a defendant hospital or clinic, an entity may not adopt statements within a journal article by the mere fact that one of its physicians wrote the piece, or even that the institution sponsored the article. Instead, the facility must actively prepare its own materials based on content in the article or otherwise use the article for its own purposes.^[8] Unless an organization uses the content of a peer-reviewed article, it cannot be said that the party “adopted” the statements in the article.

In the typical situation, a hospital would not normally manifest an adoption or belief in the truth of a peer-reviewed article, but it could happen—an entity may incorporate portions of the piece into marketing materials or require it to be part of teaching materials in the institution’s affiliated university.^[9] These actions could arguably transform a stand-alone statement into an adoptive party admission. In contrast, if an entity does not actively use the content of books or articles published by its physicians, medical malpractice plaintiffs likely will not be able to establish the predicate for admissibility of the materials under Rule 801(d)(2)(B).^[10]

Hospitals and Clinics Do Not Authorize Individuals to Speak on Their Behalf Through Journal Articles

The third type of admissible party opponent statement is an authorized admission.^[11] Rule 801(d)(2)(C) categorizes a statement as a non-hearsay authorized admission if it “was made by a person whom the party authorized to make a statement on the subject.”^[12] The rule contemplates that an organization may empower or request an individual to speak on its behalf. The relevant inquiry for a Rule 801(d)(2)(C) analysis is whether the person making the statements had specific permission to speak on the subject.^[13] In most circumstances, a health care organization will not authorize affiliated physicians to publish specific statements on its behalf. By way of example, a hospital would not typically give one of its physicians a message and ask the doctor to communicate it through a publication. The organization may expect its providers to publish materials or require publication as part of an employment contract, but the particular content of the materials generally is not funneled from the institution through the author, even if the entity is involved in the publishing process. That is, peer-reviewed articles are not explicit declarations from an institution. Instead, they are accepted as the product of the author who worked to reach conclusions in his own field, not to serve as a mouthpiece for any hospital or clinic. Therefore, as a general matter, journal articles are

not authorized admissions under Rule 801(d)(2)(C) and should not qualify as party opponent statements.

Health Care Organizations Usually Do Not Control the Content of Peer-Reviewed Publications Written by Physicians

Subsection 801(d)(2)(D) provides a fourth category of admissible, non-hearsay statements: vicarious admissions. A vicarious admission is a statement by a party's agent concerning a matter within the scope of the agency, and made during the existence of the agency relationship.^[14] The party offering the statement must establish the existence of an agency relationship and that the statement at issue was made on a matter within the scope of that relationship while it existed.^[15] Stated differently, vicarious admissions must concern a matter within the declarant's scope of duties.^[16] Courts also have held that if the speaker is not "subject to the control of the party opponent," she cannot be deemed an agent for purposes of Rule 801(d)(2)(D).^[17]

At first glance, the relationship contemplated by Rule 801(d)(2)(D) should not apply to authors of peer-reviewed articles who are employed by a particular hospital or health system. Generally, physicians are hired to provide care and treatment to patients. While many conduct research and publish works in addition to their treatment obligations, the organization may not have absolute control over the subject matter or content of the publications such that it could prevent a physician from publishing an article on a particular issue or compel the doctor to reach a specific conclusion in his or her findings. As such, in a typical situation, the physician-author is not acting under the direction of his or her employer when publishing peer-reviewed articles and the material is not admissible under Rule 801(d)(2)(D).

But, exceptions may apply. Many hospitals are research facilities connected to universities. The physicians at those centers are expected to research and publish as part of their job. Indeed, some physicians do not treat patients at all, but are simply paid to research and write. If a doctor, in the scope of his employment at a research facility, for instance, publishes an article or blog or textbook under the hospital's name, can it be attributable to that hospital? The same question applies to materials on the hospital's online library—are they all attributable to the hospital? If the hospital had broad editorial authority or the power to approve or disapprove of the content, a court may decide that the piece is a vicarious admission.

One factor that may influence courts is the presence (or absence) of an explicit disclaimer indicating an institution's control over the content of a particular publication. An entity may, for example, include a specific disclaimer in the journal it sponsors announcing that the opinions expressed by authors contributing to the journal do not necessarily reflect the opinions of the institution. Similarly, the front of a medical textbook may contain a disclaimer that the publisher does not make any representations about the content within the book. On the other end of the spectrum, a website may include terms and conditions that purposefully tout an organization's control over the content.^[18] In each situation, the language used may impact a court's decision on whether the content of the piece can be contributed to the affiliated entity.

For medical malpractice defendants, with or without explicit disclaimer language, the key to avoiding vicarious admissions under Rule 801(d)(2)(D) is establishing that the medical institution does not have control over the content of its affiliated physicians' publications.

It Is Highly Unlikely That 801(D)(2)(E) Would Apply to Peer-Reviewed Articles

The fifth and final subsection of Rule 801(d)(2) would only come into play if an author and a party were engaged in an illegal conspiracy or joint venture. Rule 801(d)(2)(E) excludes from the definition of hearsay a statement made by an opposing "party's coconspirator during and in furtherance of the

conspiracy.”^[19] The exemption would only be used in a rare circumstance, and otherwise does not give opponents an opportunity to use journal articles against hospitals or clinics.

Conclusion

Applying the Rules of Evidence, statements contained in academic or peer-reviewed articles are not usually admissions of hospitals, clinics, or other affiliated health care parties. Nor should they be. From a practical standpoint, a medical facility cannot be bound by the details of clinical trials, research, and conclusions presented by its staff physicians. Statements in one article may, in fact, contradict statements in a separate, previously published article by a different author. Common sense dictates that an opposing party cannot use that information to corner a party that had no involvement with or control over either publication. Doctors at the Mayo Clinic, as just one example, have over 6,392 publications and articles in peer-reviewed journals.^[20] It is not rational or fair to permit opposing parties to use statements in those articles in a trial against Mayo. Indeed, if plaintiffs were allowed to bind hospitals to the written statements of its doctors, there could be a negative, chilling effect on valuable publications. Still, given the current framework of Rule 801(d)(2), hospitals and clinics should be aware of potential scenarios in which they may be held accountable for the statements of others.

If plaintiffs like those in the *Stowell* case continue to test the system, we will see more case law develop. In the meantime, the Rules of Evidence generally should preclude opposing parties from admitting journal articles as party admissions and, from a policy perspective, that appears to be the right result.

[1] *Stowell v. Huddleston*, No. 09-192, 2010 WL 2733179, at *6 (D. Minn. July 9, 2010).

[2] *Id.*

[3] While this article focuses on medical institutions, many of the issues may also arise for universities.

[4] Fed. R. Evid. 801(d)(2).

[5] *Id.*

[6] *Id.*; see also *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 239 (2d Cir. 1999).

[7] *Id.*

[8] See, e.g., *Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487, 500-01 (D. Del. 2005) (documents admissible under 801(d)(2)(B) after defendant took materials and produced its own report which “incorporated many of the ideas and issues” found in the original documents); *Agric. Ins. Co. v. Ace Hardware Corp.*, 214 F. Supp. 2d 413, 416 (S.D.N.Y. 2002) (party prepared accident report that relied in part on out-of-court statements of eyewitnesses).

[9] A hospital or clinic also could reference an article in its policies and procedures, but that may raise separate questions altogether. Policies and procedures generally are not admissible evidence. See, e.g. Minn. Stat. § 145.65 (“No guideline established by a review organization shall be admissible in evidence in any proceeding brought by or against a professional by a person to whom

such professional has rendered professional services”). If the policies are not admissible evidence, it follows that a party should not be permitted to use the policies to show that the defendant adopted the substance of an article as its own admission.

[10] Along similar lines, an expert testifying in a medical malpractice case must recognize an article, book, treatise, etc. as authoritative before opposing counsel can cross-examine the individual using the material. See Fed. R. Evid. 803(18) (Cross-examination of expert witnesses with published articles is permitted if the publication is "established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice").

[11] Fed. R. Evid. 801(d)(2)(C).

[12] *Id.*; *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 619 (4th Cir. 1991).

[13] *Id.*

[14] Fed. R. Evid. 801(d)(2)(D).

[15] *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 636 (8th Cir. 2007).

[16] *Id.*

[17] *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995).

[18] See, e.g. <http://patient.info/terms-and-conditions> (last visited Aug. 6, 2015) (“The Website contains content generated by us (or on our behalf by medical authors)”).

[19] Fed. R. Evid. 801(d)(2)(E).

[20] Mayo Clinic, <http://www.mayoclinic.org/about-mayo-clinic/facts-statistics> (last visited Aug. 4, 2015).

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