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*The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists*

## **RISK MANAGEMENT ARTICLE**

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### **Owning a Practice and Liability for Others' Treatment**

As the claims administrator for the Dentists Advantage Program, Intercare Insurance Services handles a wide variety of dental claims, including those that arise from an employee dentist's treatment. One question we often receive is: "am I responsible for the dental services that another dentist provides in my office?" The answer depends upon things such as the type of employment relationship you have with the treating dentist, the laws in the state in which you practice, and whether the issue is limited to the conduct of the treating dentist or if it also involves the actions of your staff or your office policies and procedures.

Legal liability for another person, such as an employee, is called vicarious liability. When you report a claim arising from treatment rendered by a dentist who practices in your office, your Claims Specialist will ask several questions to determine whether you may be vicariously liable for the other dentist's treatment. One of the first questions your Claims Specialist will ask is whether the treating dentist is an employee or an independent contractor. The reason the distinction is important is because most states' laws as to vicarious liability set forth that an employer is legally liable for her employees' wrongful conduct as long as the employee was acting within the scope of his or her employment.<sup>1</sup> Although there are state-specific laws that provide exceptions, if the dentist who provided the treatment at issue is your employee, you will likely be vicariously liable for her alleged negligent treatment. This does not mean that the employee dentist is not also responsible for her own conduct; however, you, as the employer will also be responsible.

In situations in which the treating dentist is an independent contractor, the general rule is that the practice owner is not vicariously liable for the wrongful conduct of the treating dentist. However, there are many exceptions to this general rule. The most common exception is how much control, you, as the practice owner, have over the dentist's treatment. Some of the things that may indicate you have control over another dentist's treatment is whether you supply the instruments, whether you set the dentist's working hours, and whether you have control over the dentist's schedule. Again, if the Court were to determine that you are legally liable for an independent contractor dentist's treatment, it means you share in the responsibility of the wrongful conduct along with the treating dentist.

Regardless of whether the treating dentist is an employee or an independent contractor, another important piece of the puzzle must be considered: the contract you have with the treating dentist. The language set forth in the employment contract can be the difference between your policy paying hundreds of thousands of dollars to an injured patient and paying nothing. Accordingly, when you report a claim or lawsuit to Intercare which involves treatment by an employee dentist, the second question you will likely get is: do you have a written contract with the treating dentist? Although even the most artfully drafted employment contract will not magically remove the legal liability your state's laws may place upon you, the language in the contract can shift onto the treating dentist the *financial responsibility* of defending you in a claim or lawsuit and paying the settlement (or jury verdict). Your Claims Specialist will be looking for what is called the "defense and indemnification clause" in the employment contract. Most employment contracts will include this clause which generally requires the treating dentist to pay your legal fees and any settlement or verdict monies you must pay arising out of the treating dentist's conduct. If this clause is enforced, this will prevent your (or the practice's) policy from making payments for defending a claim that results from another doctor's treatment. Again, the specific language in the contract will be different from state to state as the contract language will need to comply with the local laws of the state in which your practice.

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In addition to looking for a “defense and indemnification clause” in the employment contract, your Claims Specialist will also be looking for language setting forth that the employed dentist maintain her own liability insurance. This is also a very important provision that should be included in the employment contract and can increase your chances that your policy does not pay for the errors of another dentist. Regardless of whether you may be vicariously liable (legally) for the treating dentist’s wrongful conduct, if the treating dentist also has her own insurance policy, when settling a claim, your Claims Specialist will push to have the treating dentist’s policy pay for the entire settlement. Avoiding payment from your own policy can shelter you from the consequences of having a settlement paid by your policy such as reporting and insurability issues.<sup>2</sup> If the employed dentist does not have her own policy, even if your liability is questionable, it is not uncommon that the practice owner’s policy will end up paying the entire settlement.

Even if a claim arises from an appointment with an independent contractor who carries her own insurance, there are times when you could face some legal liability for claims relative to the employed dentist’s treatment. Many times, claims do not arise solely from dental treatment, but also include alleged injury while on the dental office premises (trip and fall), violations of HIPAA, billing errors, or conduct of the staff. As the owner of the practice you may be liable for claims arising from the foregoing, even if the patient presents to your practice to be treated by an employed dentist. Generally, the owner of the practice bears the responsibility to ensure the office premises are safe for patrons, that patient’s personal health information is secure, that the billing of insurance companies for services is performed correctly, and the staff employees are providing adequate services (including those licensed employees such as dental hygienists, and in some states, dental assistants). One common issue that arises in dental claims is instances in which a patient is injured while receiving treatment by a dental assistant. Many times, when an independent contractor dentist treats patients, she works with dental assistants who are employed by the practice as opposed to those who work solely for the employed dentist. In most instances, if a patient is injured by a dental assistant, even if that individual is assisting an independent contractor dentist, the employer clinic owner will end up bearing some responsibility for the patient injury. This is the vicarious liability concept described above. If the dental assistant was acting within the scope of her employment (even if being supervised by another non-employed dentist), you, as the employer, may be liable for her conduct. This is another situation in which the treating dentist and the practice owner may share responsibility for paying a settlement or verdict to an injured patient. However, in matters in which the employed dentist has very little input (such as office policies/procedures or the safety of the premises) the owner of the practice will generally end up paying the entire settlement amount.<sup>3</sup>

In summary, although there is not necessarily an iron-clad way to completely protect you from liability arising from an employed dentist’s treatment; one way to reduce your risk is to consult with an experienced local attorney to draft an employment contract that includes a “defense and indemnity” provision and the requirement that the employed dentist carry her own liability insurance. It is surprising how many claims come in to the Intercare office in which the practice owner advises us that there is *no contract at all* between the practice owner and the employed dentist. To reduce your risk of becoming responsible for another dentist’s treatment, your first line of defense is a well written employment contract. Intercare works with attorneys in nearly every state who specialize in working with dentists and other health care professionals and we are happy to provide referrals. A second line of defense is ensuring that your office policies and procedures are adequate to protect you from legal liability arising from patient injury, regardless of which provider that patient is seeing. The attorney who assists

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you with drafting an employment contract can also educate you on the local state laws and provide advice as to what types of policies and procedures you can employ in your practice (such as reducing the control you have over the dentist's practice) to further protect you from vicarious liability for an independent contractor's wrongful conduct.

<sup>1</sup> Each state has its own laws regarding vicarious liability for employees and independent contractors; contact a local defense attorney to discuss your specific circumstances.

<sup>2</sup> Whether Intercare is required to report the payment of a settlement or a verdict depends upon federal law as well as state laws that vary from state to state.

<sup>3</sup> Be sure to discuss with your insurance broker which types of claims are covered under your Dentist Advantage policy and whether you should seek a separate Business Owners Policy for potentially uncovered claims.

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